(18,580.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 352.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILL HOLLOWAY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1901, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the second day of December, A. D. 1901, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twenty-fifth day of July, A. D. 1901, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Will Holloway was defendant in error, which said transcript of record is in the words and figures following, to wit:

(*a*)

a United States of America—ss.

The President of the United States, To the Honorable the Judges of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas—Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April Term, 1901, thereof, between Will Holloway, plaintiff and The Choctaw, Oklahoma and Gulf Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, Choctaw, Oklahoma and Gulf Railroad Company, as by complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 22nd day of August, 1901, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of June in the year of our Lord one thousand nine hundred and one.

The Seal of the Circuit Court U. S. A. Western Division of East. Dist. Ark.

Issued at office in the City of Little Rock, with the seal of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas dated as aforesaid.

W. P. FEILD,

Clerk Circuit Court United States, Western Division of the Eastern District of Arkansas.

Allowed by
JACOB TRIEBER, Judge.

Service acknowledged. J. W. HOUSE,
Atty. for Holloway.

Indorsed: Filed June 22, 1901. W. P. Feild, Clerk.

Return to Writ.

United States of America,
Western Division of the
Eastern District of Arkansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court U. S. A. Western Division of East. Dist. Ark.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Little Rock, this 13th day of July A. D. 1901.

W. P. FEILD,
Clerk of said Court.

1 Be it remembered that on the 29th day of March, 1901 came into the office of the Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, the Choctaw, Oklahoma and Gulf Railroad Company by J. W. McLoud and E. B. Peirce, Esqs., its attorneys and filed therein its transcript on removal from the Lonoke Circuit Court of Arkansas in case of Will Holloway vs. Choctaw, Oklahoma and Gulf Railroad Company, which transcript of proceedings in said Court is in the words and figures following, to wit:

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Pleas before the Hon. Geo. M. Chapline Judge of the Lonoke Circuit Court on the 7th day of Feb. 1901.

Will Holloway
vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Complaint at Law.

On this day comes the plaintiff W. H. Holloway and for cause of complaint herein, states that on the 30th day of October, 1900, he was employed by the defendant company as a fireman, and was then engaged in his duties as such
2 fireman, that on the night of said day he and one W. H. Davis, who was employed by said defendant Company as an engineer were at Brinkley, Monroe County, Arkansas, and while there, the said W. H. Davis and the plaintiff received orders from their superior officer, the chief night dispatcher of defendant Company at Little Rock, Arkansas, at about 11 o'clock at night directing them to back up the switch engine No. 3 from Brinkley east to Hulbert a distance of about fifty-eight miles; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so the head-light would be in front and they would thereby be enabled to run the same with greater safety, but this request was refused and they were directed by said chief night dispatcher at Little Rock, Arkansas, to back said switch engine down to Hulbert a distance of about 58 miles, in the night-time as aforesaid, when it was dark, that in obedience to such orders and directions, the said Davis as engineer and this plaintiff as fireman left Brinkley about 11.17 p. m. with said switch engine No. 3 backing the same east in the direction of Hulbert; that in obedience to such directions, they continued to run said switch engine backward until they reached Trestle No. 547 a distance of about 13 miles east of Brinkley, where they ran upon and collided with a horse on said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed and the plaintiff was caught between the tank and the engine and was thereby seriously and permanently injured as follows to wit:

Two or more ribs were broken, his kidneys were bruised and lacerated, and there were internal bruises, lacerations and injuries from which he suffered continuous and excruciating pain; both in body and mind ever since, and he continues so to suffer; that said broken ribs, bruised and lac-
3 erated kidneys and other bruises and lacerations and injuries, were all received by him on account of and by reason of the negligence of the defendant company; that said negligence of the defendant company consists in this, to wit;

1st. In directing the said Davis and this plaintiff to run said switch engine backwards in the night-time when it was dark.

2nd. In not providing for and having a headlight on the back end of said engine.

3rd. In not placing a man on the foot board in front of said engine, with a white and red light, as required by the rules of said defendant company, and as required by law.

4th. In not providing for and furnishing said engine with a pilot or cow catcher.

5th. That said engine was a regular road engine except it had foot boards at each end for a man to stand on with lights. It was a square or box engine and did not slope forward and downward so as to give a better view in front of the engine.

6th. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances with which to do his work as such fireman; and it negligently failed to do so in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence as above stated the plaintiff has suffered the injuries above mentioned and has suffered therefrom long, intense and excruciating pain, both physical and mental, and has thereby been damaged in the sum of Ten Thousand Dollars. He further states that the defendant company is a railway corporation organized under the laws of the State
4 of Arkansas and is and was on said date running and operating a railroad in this state through Pulaski, Lonoke and other counties. He further states that by reason of said injuries caused by the neglect of the defendant as above stated he has been forced to make a drug and medical bill in the sum of seventy-five dollars; wherefore he prays judgment for the sum of $10,075.00 and for such other and further relief as he may be entitled to.

(Signed) J. W. HOUSE, Attorney.

State of Arkansas,
County of Pulaski.

Will Holloway states that he is the plaintiff in the above cause and that he believes the statements set forth therein are true.

(Signed) WILL HOLLOWAY.

Subscribed and sworn to before me this 9th, Nov. 1900.

(Signed) ELLEN W. REINHARDT.

My Commission expires Dec. 24th, 1902.

Filed and summons issued this 10th November, 1900. W. T. Couch, Clerk. By J. D. Shute, D. C.

Summons Circuit Court.

State of Arkansas
To the Sheriff of Lonoke County:

You are hereby commanded to summons Choctaw, Oklahoma and Gulf Railroad Company to answer on the first day of the next Feby. term of the Circuit Court of Lonoke County a complaint filed against it in said court by Will Holloway and warn it that its failure to answer the complaint will be taken as confessed and will make due return of this summons on the first day of the next Feby. term of this court.

Witness my hand and the seal of said court this 10th day of November, 1900.

(Signed) W. T. COUCH, Clerk.
[Seal] by J. D. SHUTE, D. C.

Endorsed on the back as follows:

State of Arkansas
County of Lonoke.

On the 10th day of Nov. 1900 I have duly served the within writ by delivering a copy and stating substance thereof to W. G. Bramford Agent, of Choctaw, Oklahoma and Gulf Railroad Company at Lonoke Ark. as I am herein commanded.

(Signed) A. J. WALLS, Sheriff.

Proceedings had on the 7th day of February 1901.

Motion for Removal.

On this day comes the defendant by its attorney J. E. Gatewood Esq. and by leave of court filed its motion to remove this cause to the Federal court which petition is in words and figures as follows:

To the Hon. George M. Chapline Judge of the Circuit Court of Lonoke County, Arkansas. Your petitioner respectfully shows that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceeds exclusive of interest and costs, the sum or value of $2000. That your petitioner was at the time of the bringing of this suit and still is a corporation organized under an act of Congress of the United States entitled "An Act to authorize the purchase of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that Company" which was approved August 24th, 1894, and that the plaintiff was then and still is a citizen of the State of Arkansas. That said suit is of a civil nature, the same being an action at

6 law by the plaintiff to recover against this defendant for personal injuries alleged to have been caused to plaintiff by the negligence of the defendant in operating a railroad alleged to have been owned by it. That said suit is one arising under the laws of the United States in this to wit, that the defendant is a corporation organized and incorporated under the provisions of an act of Congress of the United States entitled an act to authorize the purchase of the property and franchises of the Choctaw Coal and Railway Company, to organize a corporation and confer upon the same all the powers privileges and franchises vested in that company which was passed by the Congress of the United States and approved on the 24th day of August 1894, and, under the provisions of which act of Congress defendant maintains its corporate capacity and carries on business as a railroad company.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said Circuit Court of the United States for the Western Division of the Eastern District of Arkansas in the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for this cause to said Circuit Court and to accept the said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States for the Western Division of the Eastern District of Arkansas and it will ever pray.

(Signed) E. B. PIERCE,
Attorney for Petitioner.

7 State of Arkansas
Pulaski County.

J. W. McLoud being first duly sworn on oath states that he has read the above and foregoing petition for removal and is familiar with the contents thereof and that the same is true, as he verily believes, that said Choctaw, Oklahoma and Gulf Company is a corporation and [the] he is its General Solicitor.

(Signed) J. W. McLOUD.

Subscribed and sworn to before me this 5th day of Feb. 1901.

(Signed) I. H. SPEERRIER, N. P.
[L. S.] My commission expires Oct. 16th 1903,

which petition is granted and ordered by the court that the cause be transferred to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas and it is further ordered that the clerk of this court transmit

to the clerk of the Federal Court a transcript of all the record, orders and papers on file in his office in the above entitled cause.

"Bond."

Know all me by these presents: That the Choctaw, Oklahoma and Gulf Railroad Company as principal and E. B. Pierce and J. W. McLoud as sureties are held and firmly bound unto Will Holloway in the sum of Three hundred dollars for the payment whereof, well and truly to be made unto the said Will Holloway his successors and assigns, we bind ourselves, our heirs, representatives and assigns jointly and severally, firmly by these presents; Yet upon these conditions; The said Choctaw, Oklahoma and Gulf Railroad Company having petitioned the Circuit Court of Lonoke County, Arkansas for the removal of a certain cause therein pending wherein
8 Will Holloway is plaintiff and the Choctaw Oklahoma and Gulf Railroad Company is defendant to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Now if the said Choctaw, Oklahoma and Gulf Railroad Company, your petitioner, shall enter in the said Court of the United States on the first day of its next term, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals this—— day of ——1901.

(Signed) CHOCTAW, OKLAHOMA AND GULF RAILROAD CO.
By E. B. Pierce.
E. B. PIERCE,
J. W. McLOUD,
Sureties.

Filed in open Court Feby. 7th, 1901. W. T. Couch, Clerk. By J. D. Shute, D. C.

State of Arkansas,
County of Lonoke.

I, W. T. Couch, Circuit Clerk, in and for said county, hereby certify the above and foregoing to be a full true and correct copy of the record and the whole thereof, in the above entitled suit heretofore pending in said Circuit Court, being numbered 1082 wherein Will Holloway is plaintiff and the Choctaw, Oklahoma and Guif Railroad are defendants said record con-

sisting of the complaint filed by said plaintiff in said
9 suit on the 10th day of November, 1900, the summons and return thereon filed in said suit on the 10th day of November, 1900, the petition for removal of said [said] suit to the United States Circuit Court filed by said defendant in said suit on the 7th day of Feby., 1901, the bond on removal of said suit to the United States Circuit Court, filed by said defendants with said petition on the 7th day of February, 1901, and the order of removal of said suit to the said United States Circuit Court entered of record in said suit on the 7th day of Feby. 1901, all as appears on the files and of record in my office.

Witness my hand and official seal this 18th day of Feby. 1901.

(Signed) W. T. COUCH, Clerk.

[Seal] By J. D. Shute, D. C.

Fee Bill.

W. T. Couch, Clerk.....$2.50
A. J. Walls, Sheriff..... .60
Transcript 3.00

Filed, March 29th, 1901. W. P. Feild, Clerk.

10 United States of America.
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 22nd day of October, Anno Domini, one thousand nine hundred, at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. District Judge presiding and holding said Court, the following proceedings were had, to wit, March 29th, 1901.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the defendant by J. W. McLoud and E. B. Pierce, Esqs., its attorneys and files herein its transcript on removal from the Circuit Court of Lonoke County, Arkansas, and also its demurrer to the complaint therein contained.

Which demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Demurrer.

Comes the defendant, the Choctaw, Oklahoma and Gulf Railroad Company and demurs to the complaint of the plaintiff herein and for cause says:

11 That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays that judgment be entered in its favor upon said complaint, and that defendant be dismissed with all its costs.

((Signed) J. W. McLOUD,
E. B. PIERCE,
Attorneys for Defendant.

Filed March 29th, 1901. W. P. Feild, Clerk.

12 United States of America.

Western Division of the Eastern District of Arkansas.

Be it remembered, that at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 1st day of April, Anno Domini, one thousand nine hundred and one, at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. District Judge presiding and holding said court, the following proceedings were had, to wit: April 6th, 1901.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House, Esq., his attorney and by leave of court files herein his amended and substituted complaint. Which amended and substituted complaint is in words and figures following, to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

On this day comes the plaintiff Will Holloway, and for amended and substituted complaint herein states that
13 the defendant is a corporation and operates a railroad in this State, and that on the 27th day of October, 1900, he was employed by the defendant company as a fireman; that on the 29th day of October, 1900, he entered upon his duties as such fireman, and began work for the defendant as such, and that on the 31st day of October, 1900, he was engaged in his duties as such fireman, and that, on the night of said day, while he was so engaged, he and one W. H. Davis, who was employed by said defendant company as an engineer, were at Brinkley, Monroe County, Arkansas, and while there the said W. H. Davis, and the plaintiff received orders from their superior officer, the Chief Night Dispatcher or Train Master, of the defendant company at Little Rock, Arkansas, who has exclusive control of the movement of all trains and engines at about 11 o'clock at night, directing them to back up the Switch Engine No. 3, consisting of an engine and tank or tender, from Brinkley east to Hulbert, a distance of about sixty miles, because engine No. 33 in use at the dirt pit at Hulbert, where quite a number of men were at work repairing the road bed, was ditched and disabled; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so the head-light would be in front and the tank or tender in the rear, and they would thereby be enabled to run the same with greater safety, but this request was refused, and they were directed by said Chief Night Dispatcher or Train Master, at Little Rock, to back said engine down to Hulbert, a distance of about sixty miles in the night time as aforesaid, when it was dark; that in obedience to such orders and directions, the said Davis as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. of the night of October 31, 1900, with said switch engine No. 3, backing the same east in the direction of Hulbert; that in obedience
14 to such directions, they continued to run said switch engine backward until the reached trestle No. 547, a distance of about 13 miles east of Brinkley, where they ran upon and collided with a horse upon said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed, and the plaintiff was caught between the tank or tender and the engine and was thereby seriously and permanently injured, as follows, to wit:

Two or more ribs were broken, his kidneys were bruised and lacerated, and there were internal bruises, lacerations and injuries from which he has suffered continuous and excruciating pain both in mind and body ever since, and he continues so to suffer; that the said broken ribs, bruised and lacerated kidneys and other bruises, lacerations and injuries were all received by him on account of and by reason of the negligence of the defendant company that by reason of said injuries he has been permanently disabled, and at that time he was 33 years old, and was earning about $80.00 per month; that the said negligence of the defendant company consists in this, to wit:

1st. In directing the said Davis and this plaintiff to run said switch engine consisting of an engine and tank or tender, backwards in the night time when it was dark.

2nd. In not providing for and having a head-light on the back of said engine.

3rd. In not placing a man on the footboard in front of said engine with a white and red light, as required by the rules of said defendant company, as required by law.

4th. In not providing for and furnishing said engine
15 with a pilot or cow-catcher.

5th. That said engine was a regular road engine except it had foot boards at each end for a man to stand on with lights. It was a square or box engine, that is, the tank or tender did not slope forward and downward so as to give a better view in front of the engine.

6th. That the brakes on the engine were out of repair and could not be worked or used at the time of the injury aforesaid, that is to say when the air was applied to the brakes, those on the tank or tender in front of the engine, that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender while the brakes on the engine were not in a condition to work, the same being out of repair and the shoes could not be made to clasp the wheels and thereby stop the engine in fact there were no shoes on the brakes of the engine and when the engineer discovered the horse on the track he immediately applied [to] air to the brakes so as to stop the engine and tank or tender, as soon as possible, the brakes were successfully applied to the wheels of the tank or tender, but the brakes on the engine being out of repair could not be worked, and the shoes of said brakes if any, could not be made to clasp the wheels; that the effect of applying the air to the brakes as aforesaid was to stop the tank or tender, in front or east of the engine, and it had no effect whatever on the engine, thus the engine was

forced with all its weight and momentum upon and against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the engine and tank or tender, closer together, and as the plaintiff was attempting to escape by going out
16 between the ends of the engine and tank or tender, he was caught between the same and thereby injured as aforesaid, that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes.

7th. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances with which to do his work as such fireman, and with a reasonably safe place to perform such work, and it had failed so to do in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence above stated, the plaintiff has suffered the injuries above mentioned, and has suffered therefrom long, intense and excruciating pain both physical and mental, and has thereby been damaged in the sum of Ten thousand dollars.

He further states that by reason of said injuries caused by the neglect of the defendant as above stated that he has been forced to make a medical and doctor's bill in the sum of about One hundred and fifty dollars.

Wherefore he prays judgment for the sum of Ten thousand dollars on account of said injuries, and the sum of One hundred and fifty dollars for his medical and doctor's bill and for such other and further relief as he may be entitled to.

(Signed) J. W. HOUSE and
M. HOUSE,
Attorneys for Plaintiff.

State of Arkansas,
County of Pulaski.

Will Holloway states that he is the plaintiff in the above entitled cause, and that he believes the statements in the foregoing amended and substituted complaint are true.

(Signed) WILL HOLLOWAY.

Subscribed and sworn to before me this 5th day of April, 1901.

D. H. CANTRELL,
Notary Public.

Filed, April 6th, 1901. W. P. Feild, Clerk.

17 And on April 25th, 1901, the following proceedings were had to-wit:

Will Holloway
5186 vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the defendant by E. B. Peirce, Esq., its attorney and by leave of court files herein its answer to amended and substituted complaint.

Which answer to amended and substituted complaint is in the words and figures following to-wit:

18 In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.

April Term, 1901.

Will Holloway, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Answer of Defendant to Amended and Substituted Complaint.

Now comes the defendant, the Choctaw, Oklahoma and Gulf Railroad Company, and for answer to the complaint of the plaintiff herein says.

That it is not true, as alleged in plaintiff's complaint, that plaintiff and said engineer Davis were ordered or directed by the Chief Train Dispatcher or Trainmaster, or any one else, to run said engine and tender backward from Brinkley to Hulbert as alleged in plaintiff's complaint, but admits that the said Davis as engineer and this plaintiff as fireman left Brinkley at 11:17 on the night of October 31, 1900, with switch-engine No. 3, backing the same east in the direction of Hulbert; admits that they continued to run said switch engine backward until they reached trestle No. 547 where they ran upon and collided with a horse upon the said trestle (whether with or without fault on their part, this defendant has no knowledge or information sufficient to form a belief) and said switch engine was thereby derailed and that plaintiff was injured to some extent; but denies that two or more ribs were broken, his kidneys were bruised and lacerated, and that he received bruises, lacerations and injuries from which he has suffered continued and excruciating pain both in mind and body ever since, and he continues so to suffer; denies that by reason of said injuries he has been permanently disabled and that he was thirty-three years old and was earning eighty dollars per month; denies that the alleged broken ribs, bruises and laceration of kidneys and other bruises, lacerations and injuries were all received by him on account and by reason of the negligence of the defendant company; denies that the defendant company was negligent.

1st. In directing the said Davis and this plaintiff to
19 run said switch-engine, consisting of an engine and a tank or tender, backwards in the night time when it was dark, and denies that said Davis and plaintiff were so directed.

2nd. Denies that it was negligent in not providing for and having a head-light on the back of said engine.

3rd. Denies that it was negligent in not having a man on the foot-board in front of said engine with a white and red light as required by the rules of said defendant company and as required by law, and denies that there is such a rule of the company or such a requirement of law.

4th. Denies that it was negligent in not providing for and furnishing said engine with a pilot or cow-catcher.

5th. Denies that it was negligent because said engine was a regular road engine except it had foot boards at each end for a man to stand on with lights, and because it is a square or box engine, or the tank or tender did not slope forward and downward so as to give a better view in front of the engine.

6th. Denies that the brakes of the engine were out of repair and could not be worked or used at the time of the injury aforesaid as alleged in plaintiff's complaint, and in respect to said brakes this defendant alleges that said engine had no brakes whatever on the engine, admits that the brakes on the tender or tank were in good working condition, denies that the effect of applying the brakes on the tender was to stop the tank or tender in front or east of the engine and by reason of the alleged defect in the brakes on the engine the engine was forced with all of its weight and momentum upon or against the tank or tender, thereby bending the gooseneck and breaking the draft castings between the engine and tank or tender (which defendant denies was also defective and out of repair) and bringing the ends of the engine and the tank or tender together, and as plaintiff was attempting to escape by going out between the ends of the engine and tank or tender he was caught between the same and was thereby injured as aforesaid, and denies that plaintiff had only been on said en-
20 gine for a few hours, and denies that he knew nothing of the condition of the brakes.

7th. Defendant denies that it has failed to comply with any rules of law or contract with the plaintiff by which it was in duty bound to furnish him with reasonably safe instrumentalities, machinery and appliances with which to work as such fireman and a reasonably safe place to perform such
21 work, and denies that it has failed so to do in the particulars above named or in any particulars named in

plaintiff's complaint, and denies that by reason of said failure to perform its duty as alleged in plaintiff's complaint, and by reason of the negligence therein stated, the plaintiff has suffered the injuries above mentioned and has suffered therefrom, intense and excruciating pain, both physically and mentally, and has thereby been damaged in the sum of ten thousand dollars, or in any other sum.

Defendant further answering, denies that by reason of said alleged injuries caused by the alleged neglect of the defendant as above stated plaintiff has been forced to make a medical and doctor bill in the sum of about one hundred and fifty dollars.

Defendant further answering, states that it has not been guilty of negligence in any respect, manner or degree in producing the injuries complained of by said plaintiff. Defendant alleges that if the injury is due to carelessness or negligence on the part of anyone, that it is due entirely to the carelessness and negligence of the plaintiff himself, and that the injury, if any, is the result of a risk assumed by said plaintiff, and for which defendant is in no respect liable to plaintiff.

Wherefore, having fully answered, this defendant asks to be dismissed with all of its costs.

E. B. PEIRCE,
Attorney for Defendant.

Filed April 25th, 1901. W. P. Feild, Clerk.

And on May 6th, 1901, the following proceedings were had to wit:

22 Will Holloway
5186 vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House and Menafee House, Esqs., his attorneys and comes the defendant by E. B. Peirce, Esq., its attorney and the parties announcing themselves ready for trial thereupon came a jury, to wit:

J. C. Rogers, Jack Barnett, Jobe Hyde, J. K. Brantley, J. S. Tucker, J. D. McLaughlin, M. Watson, R. Wood, J. A. Carpenter, W. S. Veazy, Robert Harper, and W. P. Johnson, being twelve good and lawful men of the district who were duly tried, empanelled and sworn well and truly to try the issues joined between the plaintiff and the defendant and a true verdict give according to the law and the evidence; thereupon the jury proceed to hear the evidence as well on the part of the plaintiff as of the defendant, and the trial hereof not being concluded the same is continued until to-morrow morning at half-past nine o'clock.

23 And on May 7th 1901 the following proceedings were had to wit:

Will Holloway
5186 vs.
The Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House and Menefee House, Esqs., his attorneys and comes the defendant by E. B. Peirce Esq., its attorney and come the jury to wit:

J. C. Rogers, Jack Barnett, Jobe Hyde, J. K. Brantley, J. S. Tucker, J. D. McLaughlin, M. Watson, R. Wood, J. A. Carpenter, W. S. Veazy, Robert Harper and W. P. Johnson and the trial hereof not being concluded on yesterday the same is now resumed, and the jury having heard all the evidence and argument of counsel and having been charged and instructed by the court retired to consult of their verdict.

Which charge of the court to the jury is in the following words to wit:

Gentlemen of the jury:

This is an action to recover damages for injuries alleged to have been sustained by the plaintiff while in the employ of the defendant railroad company, in an accident alleged to have been caused through the negligence of the railroad company. In actions of this kind the liability of a railroad is quite different from that in case of a passenger. The law governing the liability of a railroad for injuries sustained by an employe is that of master and servant. There is no greater liability assumed by a railroad toward its employes
24 than that of any other employer, whether a corporation or an individual. The railroad company is not an insurer of its employes; all that is required of it by the laws of the country is to furnish its employes working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that then it has discharged its duty, and in case of accident to one of its employes, it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employe with the tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries.

The burden of proof to establish the fact that the plaintiff was injured and that the injury occurred by reason of the negligence of the defendant, is on the plaintiff, and he must establish both of these facts by a preponderance of the evidence. The mere fact that he was injured while engaged in the service of the defendant is not sufficient to entitle him to

a verdict; he must also show that he sustained the injury by reason of the defendant's negligence. Negligence in cases of this kind consists in the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employe knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the emplover, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover although he may have been injured very se-
25 verely.

The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you can consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time the alleegd injuries were sustained, was not supplied with proper brakes and brake-shoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without any headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made the trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person under all the circumstances, should have known the fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant.

That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience if the least reasonably prudent, was bound to have noticed it, espe-
26 cially after riding on it and acting as fireman for a trip of 58 to 60 miles.

This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact, he undertook the trip, then he cannot recover and your verdict should be for the defendant, without considering anything more.

But if you find the facts otherwise, i. e., that he did not know this or could not have known it as a reasonably prudent person, then it will be necessary for you to determine other facts. In this connection I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and found reasonably safe, unless informed that it was not; at the same time he cannot close his eyes to obvious defects, and will be charged with such knowledge of defects if they were patent and apparent to a man who for a number of years has been a locomotive fireman.

Now the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff [recovered] his alleged injuries was caused by reason of want of brakes on the engine. For if the accident could not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this
27 action, and your verdict should be for the defendant.

On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff, and Davis, the engineer.

The plaintiff testified, that, while he did not see the horse that caused the accident, the engineer called to him, "Look out, look out;" that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine, had it been supplied with proper brakes, but having no brakes on the engine the failure to stop the engine as rapidly as could have been done if supplied with brakes, caused the accident whereby plaintiff was injured. On the other hand, the engineer testifies that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so, you are to take into consideration all the circumstances existing at the time; the kind of night it was; the fact that the

locomotive was running backward; that there was no light in front; that the engineer kept as good a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact, whether if there had been brakes, the engine could have been stopped before striking the horse after its presence in the track had been discovered by the engineer.

If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and
28 that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant.

If your verdict is for the plaintiff on these issues, the next thing for you to determine is was he injured in this accident; if you find he was, then he is entitled to compensation, as I shall fully explain to you, but if you find that he was not injured in that accident, he is of course, not entitled to any verdict.

The measure of damage, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident; next the loss of wages during the time that he has by reason of these injuries, been incapacitated from doing any work, next, if the jury find from the evidence that the plaintiff by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured, and what they think he will earn in his present condition, making such allowance for such time hereafter, as, in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning, as much as he would without the injuries sustained by the accident. The tables showing the probability of his life which have been introduced are not conclusive, but may be considered by you, with such other facts as your good sense and judgment tells you to use for the purpose of determining for how long, if at all, the plaintiff should receive such compensation. You may allow him compensation for the pain and suffering, if any caused by this accident. This pain and suffering includes both mental
29 and physical. The amount of such compensation must be determined by you, as neither the law nor any person

can fix an exact basis for compensation for pain and suffering. Such a matter is left to the good judgment of the jury, who must act as reasonable men, without any favor or prejudice.

While it is hardly necessary for me to mention this fact to you, yet it will do no harm to say to you that, in determining what your verdict shall be in this case, you are not [a] to be influenced in any wise by the fact that the defendant is a corporation or railroad company, nor the plaintiff is a working man and perhaps in needy circumstances. The law knows no distinction between rich and poor, high and low. Your duty is to render a true and correct verdict according to the law and the evidence regardless of any one's standing, and uninfluenced either by sympathy or prejudice. If you do that your verdict is a just one; if you do not it is an unjust one.

You may retire and consider of your verdict.

And on May 8th, 1901, the following proceedings were had, to wit:

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House, and Menefee House, Esqs., his solicitors, and comes the defendant by E. B. Peirce, Esq., its attorney and comes the jury, to wit:

30 J. C. Rogers, Jack Barnett, Jobe Hyde, J. K. Brantley, J. S. Tucker, J. D. McLaughlin, M. Watson, R. Wood, J. A. Carpenter, W. S. Veazy, Robert Harper and W. P. Johnson and return into court the following verdict:

"We, the jury find the issues for the plaintiff and assess his damages at the sum of sixteen hundred dollars ($1600.00) (Signed) Jobe Hyde, Foreman.

It is therefore considered, ordered and adjudged that said plaintiff Will Holloway, do have and recover of and from said defendant Choctaw, Oklahoma and Gulf Railroad Company the said sum of sixteen hundred dollars ($1600.00) found as aforesaid together with all his costs herein expended and have execution therefor.

The following endorsements appear upon the margin of the record:

May 18th, 1901, J. W. House, claims a lien on this judgment for $800.00 for services rendered.

May 18th, 1901, $700.00 of the judgment assigned to W. G. Faucett and Bro., (see assignment with papers.)

May 18th, 1901. $100.00 of this judgment assigned to J. W. House, see assignment on file with papers.

And on June 22nd, 1901, the following proceedings were had, to wit:

31 Will Holloway
5186 vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Now on this day comes the plaintiff by J. W. House, Esq., his attorney and comes the defendant by E. B. Peirce, Esq., its attorney and said defendant presents here its bill of exceptions, which being found correct is now signed, sealed and made a part of the record herein; and said defendant by its said attorney also files its petition for writ of error and its assignment of errors which is by the court allowed; and said citation and writ of error are issued and service of the same are acknowledged.

And it is ordered by the court that upon the execution and filing of a bond with good and sufficient sureties by the defendant in the sum of Twenty-five hundred dollars conditioned as required by law, and when approved by the judge of this court the same shall act as a supersedeas bond on the judgment rendered herein. Thereupon said defendant presents its bond in the sum of Two thousand five hundred dollars which is approved by the court, and it is ordered that the judgment rendered herein be superseded.

Which Bill of Exceptions is in the words and figures following:

32 United States Circuit Court, Eastern District of Arkansas, Western Division.

Will Holloway, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Bill of Exceptions.

This cause coming on for trial on the 6th day of May, 1901, the plaintiff, to sustain the issues on his part, introduced the following testimony, to-wit:

Dr. Edwin Sharpe, a witness for Plaintiff, testified as follows:

Q. Where do you live? A. North Little Rock.
Q. How long have you been living there?
A. I have been living there nearly four years.
Q. What is your business or occupation?
A. Practicing medicine.

Q. How long have you been practicing medicine?

A. Since 1881.

Q. Have you been continuously in the practice since you came to Little Rock? A. Yes, sir.

Q. Do you know the plaintiff, Holloway? A. Yes, sir.

Q. I will ask you if along about the 31st of October last year, 1900, you were called to see him as a physician?

A. Yes, sir.

Q. Now, please state, doctor, fully all the conditions that you found him in at the time you were called to see him?

A. Well, he was suffering from his back—the left side of his back—about the region of the kidney. He had evi-
33 dences of bruises on the left side more particularly, and he was passing some blood, suffering considerable pain, and also in his left leg—rather impaired the usefulness of his left leg for quite a while and up until now, and while there was no abrasion, the parts were bruised considerably and the two lower ribs on the left side, floating ribs, appeared to be fractured.

Q. You say he passed blood? You mean through his urine?

A. Yes, sir, then he spit up some.

Q. How long did that blood continue to pass through the urine as well as you remember?

A. Well, I don't remember exactly. At intervals, it would check and then it would recur. I don't remember just exactly how long, for several weeks.

Q. What would that indicate, the passage of blood through the urine?

A. Well, sir, it would indicate an injury of the bladder or kidney and urethral canal. In this case, the evidence of injury was over the kidney and none about the bladder. That would evidence the fact that it was from the kidney.

Q. Has he been under your treatment since then?

A. Yes, sir.

Q. Just state what is his condition now?

A. Well, he now suffers from the back of his neck and head and the muscles of the back and the seat of the injury, and from the left leg—the left hip and leg mainly.

Q. Now, give your opinion, as a physician, are these pains that you now speak of, produced from the injury that he received at the time?

A. Well, I don't know of anything else to which they might be traceable.

Q. Then it is your opinion that they do result from these injuries? A. Yes, sir.

Q. Now, how long did he remain in bed before he
34 was able to be up at all?

A. Well, I don't remember the exact number of days, several though, I think, maybe as long as 18 or 20 days. I don't know when positively.

Q. Well, doctor, what will be the probable result, as far as you could give it, to your best judgment, as to the result of these injuries?

A. Well, sir, I can't tell about that. I couldn't tell what will be the duration of these injuries. It might be permanent; it might lead on to something else; I can't tell; it might subside after awhile, but to say how long they will continue, I couldn't say. I don't know.

Q. Is it probable that they may continue permanently or not?

A. Well, yes, sir; that is, for a considerable length of time, at least.

Q. I will ask you whether the kidney are considered vital parts to the human system? A. Yes, sir.

Q. In what way may an injury or bruise or laceration to the kidney affect him?

A. Well, it might impair the function of the kidney and destroy the power of performing their duty in the economy; that would affect them permanently; and it might be that the injury might after awhile produce a low grade of inflammation that might after awhile go on to suppuration, make an abcess, from that blood poisoning, something of that sort. You couldn't tell just exactly

Q. Now, doctor, from the way you found him, and his condition now, and from your knowledge of the course that the trouble has taken from the time you were first called to the present time, in your judgment will he be able to follow out the profession of fireman where he has to shovel coal and where he has got to have the use of his back?

A. Well, I thould think not any time soon at least.

Q. He has been under your charge since that time, has he not? A. Yes, sir.

Q. What would be a reasonable compensation for your services as a physician from the time he was injured up to this time?

A. I should think $100.00. I don't know what might be the necessity for treatment of his case hereafter. It might be a great deal more hereafter than it has been. It might not be anything.

Cross-Examination.

Q. It is largely speculation, is it not, as to what the result of an injury of that kind will be?

A. Well, it is somewhat in that light, yes sir.

Q. He might recover, might he not?

A. He might, yes sir.

Q. Entirely? A. Yes sir.

Q. He might recover in a reasonably short time, mightn't he?

A. Well, from the length of time that he has been afflicted, it is hardly probable.

Q. It is not impossible? A. No sir.

Q. You have known a great many phenomenal things in the way of healing up diseases and things in your experience?

A. Yes, sir.

Q. These pains that you speak of in his side and neck now; these are merely symptoms that you get from him, that he tells you that he is suffering from?

A. Well, not entirely. Of course, they are more or less.

Q. You are relying largely upon what he tells you about it?

A. In a measure. Of course, I can tell something about these things by certain localities eliciting pain by pressure.

Q. But after all, you are just relying upon what he says about the extent of the pain?

A. In part, I am, yes sir. We can't see a pain. We have got to rely upon what the patient says about that.

36 Will Holloway, plaintiff, being duly sworn, testifies as follows:

Q. You are the plaintiff in this suit? A. Yes sir.

Q. What business were you engaged in on the 30th of October, 1900?

A. Locomotive fireman Choctaw, Oklahoma & Gulf.

Q. That is, for the defendant in this suit? A. Yes sir.

Q. How long had you been engaged as fireman in the service of that company?

A. I was called to leave on Monday morning at one o'clock —on the 29th.

Q. What experience have you had as a fireman?

A. I have had quite a lot of experience as a fireman on the St. Louis, Iron Mountain & Southern Railway.

Q. How many years?

A. I was there the last time a little over ten months, I think, and I was there a little over a year before, and I was on the Houston & Texas Central over two years.

Q. When you quit the Iron Mountain, were you discharged, or quit of your own accord?

A. Quit of my own accord. I have a clearance in my pocket.

Q. The contract was made on the 29th of October, was it?

A. The contract—I think my application was made out about the 25th or 26th. I was called to go out—I am not sure about that, what day it was—it was somewhere on Saturday or Sunday.

Q. (Counsel for Defendant): 23rd is the date of your application? A. Yes sir.

Q. (Counsel for Plaintiff): When you were called out to go to Brinkley, after you went to Brinkley from here, did you come back any more?

A. No sir. I didn't come back here any more. They turned us at Brinkley and sent us back. We left here
37 and stopped at Brinkley; that is the terminal of the local division.

Q. What time did you make your first trip?

A. On Monday morning. I was called to leave on Monday morning, the 29th, at one o'clock, called at one to leave at two.

Q. In the night-time? A. Yes sir.

Q. You went from here to what point?

A. From here to Brinkley.

Q. From Brinkley, where did you go?

A. To Hulbert.

Q. What time did you go from Brinkley to Hulbert?

A. We were called to leave the next morning at one o'clock, and left Brinkley at two, going east still.

Q. You went from there to Hulbert, did you? A. Yes sir.

Q. Brinkley is about the middle division between this and Memphis? A. Yes sir, local division.

Q. How far is it from Brinkley to Hulbert, still further east? A. About sixty miles.

Q. Then Hulbert is this side of Memphis?

A. Yes sir, about nine miles over to Hopefield.

Q. Did you get to Hulbert before day?

A. We left there in the morning, and we had nearly daylight all the way down to Hulbert from Brinkley, yes sir.

Q. When were you ordered back?

A. We left Hulbert, I think, at 1:01, we registered out of Hulbert for Brinkley with engine 3.

Q. You mean in the afternoon? A. Yes sir.

Q. Did you bring the same engine back that you carried down?

A. No sir, we carried down 33 C., O. & G. and came back on W. & B. 3.

Q. Had you ever seen this engine No. 3 W. & B. before?

A. No sir, not until I had orders to change at Hulbert.

Q. You started back there from Hulbert at about
38 one o'clock in the afternoon of the 30th? A. Yes sir.

Q. You were ordered to what point?

A. Ordered to Brinkley.

Q. Was there any train attached to the engine and tank or to the engine?

A. No sir, nothing at all—running light.

Q. You then merely ran the engine from Hulbert to Brinkley? A. Yes sir.

Q. And when you got to Brinkley, what orders did you have?

Q. We had orders there to back up from Brinkley to Hulbert.

Q. What time did you receive these orders?

A. Received these orders—we registered in there at seven something, and I think, somewhere about ten o'clock, we received these orders.

Q. It was in the night-time? A. Yes sir, in the night.

Q. What was done then?

A. Well, on first coming into Brinkley, we were told when we got there that we had to back up to Hulbert; well, we got off and went and got our supper at the Arlington Hotel across the street, and after we came back from supper, Davis and I walked up to the office door and he says, "Come on and let us go back and see if we cannot get that operator to let us turn that engine." I said, "All right," and we waited a few minutes, and he spoke to the operator and said, "What did he say?" He said, "Wait a minute and I will tell you."—he was waiting on some other message, I suppose, at the time. I turned and walked off and said "Davis, I will go get my engine ready to go out. I had my lights to fix, ash pan to clean and to get everything ready to [do], and in a short time, Davis came out to the engine, said, "Here is what I have got," and I said, "What is it?" and he handed it over and it was just wrote across a blank telegraph form sheet and across that sheet, the dispatcher said he didn't want the engine turned.

Q. Then I understand you, when you were ordered
39 to back the engine from Brinkley to Hulbert, through the operator—was that the operator at Brinkley?

A. Yes sir.

Q. You requested their permission to turn the engine?

A. Yes sir, we asked permission to turn it more than once.

Q. And then as you came back from supper, was Davis, the engineer, in charge of the engine? A. Yes sir.

Q. As you came back up there, you inquired what about it, and he told you he would let you know in a minute?

A. Yes sir.

Q. And that telegram that Davis exhibited to you, and you read, in effect, was that they didn't want the engine turned?

[A.] The sum and substance of it was that they didn't want the engine turned? A. Yes, sir.

Q. It is agreed Mr. Holloway, you left Brinkley under these instructions? A. Yes sir.

Q. The engine you were instructed to back down to Hulbert was the same one you had brought up from Hulbert?

A. Yes sir. There were but two engines in the play—engine 33 we left here on and left at Brinkley, and then we took 3 out of there.

Q. The engine you were hurt on is described as W. & B.?

A. Yes sir.

Q. That was the engine, W. & B., 3, that you started to Hulbert on in the night time, under the direction of the dispatcher? A. Yes sir.

Q. How far did you go?

A. Somewhere between twelve and fourteen miles.

Q. About what rate of speed were you going?

A. Between seven and eight miles an hour.

Q. What did the engine consist of?

40 A. The engine and tank.

Q. You went between twelve and fourteen miles, what happened then?

A. Well, we were going down about 3 1-2 miles this side, or perhaps 4 1-2 miles this side of Palestine Station, and Davis says to me, "There is a road crossing here some place, but I don't know exactly where it is at," and I said, "That is all right, I will get up and ring my bell and if there is anybody here, they will hear us coming," and I had got up on my seat and was ringing the bell, and after we passed above the crossing, I just fell off of the seat and commenced putting coal in the fire box and the top hinge of my door was broke off and I couldn't swing it open with my chain. I had to pick it up and set it over on a latch, and then pit it up and set it back here—it was a regular old scrap pile we were on any way. I was putting my fire in and Davis was looking out, and the first thing you know he yelled out to me to lookout, and I had my face right out of the fire box and of course, I was blinded, the fire was perfectly white in the fire box, and I shut my door and hit to get out, and my intention was to step out backward and put my foot on the step and catch myself the way the engine was going, to keep from falling, and as I stepped back, he applied the air, threw the air into the emergency, gave her all the power she had to stop her, and in an instant, it struck the horse. Well, this tank and engine all bungled up together and caught me as I went to get out. I hallooed to him to release his air, I was caught, and he released his air and that caused the tank to separate, and I fell and dropped right on my knees in the tank, and as quick as I hit the tank floor, I left it flying, just as fast as I could get out of it. I went off in the brush.

Q. The first knowledge you had of any obstructions, you heard Davis halloo, "Lookout! Lookout!" A. Yes sir.

Q. What did Davis do immediately?

A. He applied his air.

41 Q. About how far, according to your judgment, did the car run before it struck the horse, after Davis hallooed, "Lookout! lookout?"

A. Why, anywhere, from 50 to 75 feet. I couldn't say exactly; that is only a matter of guessing, but I suppose somewhere between 50 and 75 feet.

Q. You say you were engaged at work, putting in a fire, when he hallooed, "Lookout," you closed the door as quick as you could, and when you straightened up, at that time, had the car struck the horse then?

A. No sir, it hadn't struck the horse. As I turned my back it hit the horse.

Q. You turned back and was attempting to get out?

A. Yes sir.

Q. You think then it must have been anywhere from fifty to seventy-five feet from the time he hallooed "Look out, Look out?"

A. Yes, sir, it must have been from 50 to 75 feet.

Q. I will ask you what effect it had on the car? What about the gooseneck?

A. Well, it is, in one sense of the word, it is a draft casting. I am a truck and tank builder in the Iron Mountain shop here, built many a one, and they are generally known among a great many men as chafing irons; that is, the two irons that play between the tank and engine; the chafing iron on the tank was broke into four pieces and judging from the way the engine got back over that one, the goose neck was bound to have bent to let it over, it being an iron both under the engine and under the tank.

Q. How far apart was the end of the engine from the end of the tank when they were in motion?

A. The standard runs from 20 to 20 1-2. 19 to 24 inch cylinder engines—Rogers—they are generally 20 or 20 1-2 inches.

Q. That would be the distance between the ends, they are coupled with this goose neck; this goose neck enters into what you call the brass casting? A. Yes sir.

42 Q. That space in there would be from 18 to 20 inches?

A. Yes sir, 19 to 21 1-2.

Q. You say as you were attempting to get out, that came so close together it caught you? A. Yes sir.

Q. What part of the body did the two strike you?

A. They got me right across here, (indicating the region of the hips and kidneys).

Q. How far apart, according to your best judgment, were the two ends from each other when you were caught between them?

A. Why, I shouldn't think, they way I was in there, it was over six or eight inches.

Q. You said while ago that you hallooed out to Davis that you were caught, and what did he do then?

A. I told him to release his air.

Q. Did he do that? A. Yes sir.

Q. What was the effect of that?

A. The engine being heavier than the tank forced the tank ahead and let me drop down on the floor, right on my knees. [Q.] Yes sir, I got out, and another section of the train was coming down upon us, and saw the headlight coming, I got up, I was spitting blood, and I knew I was hurt, as far as that is concerned, but under the book of rules I was working under, I was compelled to do my duty as a fireman, and the book of rules says where there is no brakeman to protect that train, the fireman must protect it.

Q. What did you do immediately after you got out?

A. I flagged the coming train.

Q. How far back did you go?

A. I went, I suppose, 100 yards.

Q. With your lantern? A. Yes sir.

Q. What did you do then?

A. I flagged these boys and waited until they come up, and coming along back down there, I told Davis I still
43 saw where that old horse run; he come right down the track ahead of us, and then, of course, I came on back to my engine.

Q. When did you come back to Little Rock, and how did you come?

A. Well, they got the wreck cleared the next morning, I think, about 6:30, and we asked them to let us come in. Davis sent a message here, I told him to send it; that I wanted to get some place where I could get attention, I was spitting up blood, and I knew I was hurt, I didn't know how bad, I wanted to get some place where I could get something done for me; it didn't seem they were making preparations to assist a man at all, I had to lay there and the passenger train was late; it was 1:40 when it left Palestine, and came in here about 4:40.

Q. You were there?

A. I waited from 12:40 until about 1:30 on the 31st, from the morning to the evening.

Q. You came back, what did you do then?

A. I came back here and got a doctor as quick as I could get one.

Q. Just state to these gentlemen about how you were injured, as well as you can, the effect of it and how you suffered and all about it?

A. Well, I was caught between the tank and the corner of the caboose that projects out and makes a gangway where we get in and out, and the engine had no brake on it, and judging from the distance—

Q. Well, tell about that. You say the engine had no brakes on it, when did you first find out that the engine had no brakes on it? A. After we were into the wreck.

Q. Did you know that the engine had no brakes on it when you were ordered to go back with it?

A. No, sir, I have no right to inspect an engine; I am no engine inspector; I am a locomotive fireman.

Q. When was your attention first called to the fact that the shoes were not at work on the wheels?

A. Why, after she went down there and didn't stop,
44 after he applied his air, she rolled down, and I got off and told him none of these shoes ever clasped the wheel; he said no.

Q. Did you know at that time there were no brakes on the engine at all?

A. No, sir, I didn't know it until I read it in the answer to our complaint. That was the first I knew of it at all.

Q. Now, you may state the extent of your injuries, and the extent of your suffering, and how you have felt since, and how you feel now?

A. Well, I was in bed the principal part of the time for about thirty days. I was there for 27 or 28 days, and the doctor finally told me, "I want you to get up, if you can, and walk around, and see if you can't get a little strength," I had fallen off so, and I was hurting through the small of my back and kidneys and side where I was caught and pressed in, and the water that I passed was very near blood, and for quite a long time afterwards, and also spit up blood frequently, and I suffered from the time that I was hurt until now, and am being treated by the same physician, and expect to be until I get well, or make the best of it in some way.

Q. Describe to the jury how you are affected now?

A. I am affected on my left side entirely from the base of my skull this side down the entire left side, through the small of the back, the seat of the pain being here in the region of the kidneys.

Q. Why do you use that stick?

A. I use it because I am down on one side. I can't get along.

Q. I will ask you what was your condition physically before you had these injuries?

A. Away above the average man for strength and health.
Q. Had you ever had any sickness before?
A. Never had but one spell of sickness in my life; had the penumonia in 1879.
Q. You were then a stout man at the time of the injury?
A. Considered as good a man as the Iron Mountain had, yes, sir.
Q. About what were you earning at the time of your injury?
A. Well, according to the way that I was going out
45 there, I was earning right up at the neighborhood of $90 a month.
Q. You were working up at the Iron Mountain. About what is the amount of wages that a fireman of your experience would ordinarily get?
A. The firemen on the Iron Mountain?
Q. I don't mean on the Iron Mountain, but what would the wages of a fireman ordinarily be per month?
A. Well, any kind of a fireman ought to average $80 a month.
Q. According to the wages that you had started out there, how much would that amount to a month?
A. The wages I started out would amount to over $90 a month.
Q. Did you ever do any other work on the railroad besides fireman? A. Yes, sir, been brakeman.
Q. Is the fireman a higher grade than the brakeman?
A. Different lines altogether. One is in the transportation department, and the other in the locomotive department.
Q. You had been transferred from the department of the brakeman?
A. I quit braking on account of that wrist, and went into the shops, into the locomotive and cab department, truck and tank builder on the Iron Mountain, worked in there quite a while and then went out on the road as fireman.
Q. Then, at the time you were injured, you think you were earning from $80 to $90 a month, and a fireman is worth about that much a month? A. Yes, sir.
Q. What was your age at the time you were hurt?
A. Thirty-three years and twenty-four days old.
Q. Have you been able to do any work since then?
A. No, sir, I have not.
Q. Have you done anything since then? A. Not a lick.
Q. Have you been able to perform any kind of labor?
A. No, sir, nothing at all, on account of not being able to stoop over.
46 Q. Was there anyone else on that engine, besides you and Davis, the engineer? A. No, sir, no one at all.

Q. From whom did you get engine No. 3 when you got it at Hulbert?

A. Received it from the traveling engineer, and Mr. Waters, the engineer in charge. I received it from the traveling engineer.

Q. Where did you start with the engine at that point?

A. He said that engine 3 was going to the shop for repairs, as she had worn out all her brasses and pony trucks ahead, and he used car brasses there for a makeshift, and the hose on the left side from the tank to the injector was bursted and I wrapped that with some old bagging, and her blower pipe, the valve was off of it entirely and it filled the cab with steam and water. I had a plug in there and kept it wrapped with waste.

Q. That was the tank?

A. Yes, sir, that was the front of the engine; the blow pipe, commonly called the blower, the pipe comes out of the boiler on the engine, comes back under the side of the boiler and goes up in the smoke stack. It is used in starting a fire, where your fire is not burning good; it gives it a draft.

Q. In doing that work, you have already stated that you didn't know that the engine was without brakes?

A. No, sir, I didn't know anything about it, and I never inspected it at all.

Q. Now this defect that you speak about of a certain wheel, was that in the tank or in the engine where you had to fill up the wheel to keep it from getting hot?

[Q.]That was on the engine; the pony trucks run ahead. He told us that he had put some car brasses in there and she would do until we got to the shop; she was ordered to the shop, he told us when we left, and said to watch her and keep her from running hot, and cool her down and repack her, and probably she would get to running cool after she formed a seat in the brasses.

Q. Do you recollect whether there was anything said
47 to the dispatcher in charge at Brinkley about backing the engine onto the train to carry it down?

A. Yes sir, he said for us to go in on the house track and these other boys would pull in on the passing track and we could drop in behind them, and they would couple in behind the air and pull us down there, and we pulled in on the house track and they cut the train in two and was backing down and stopped, and some one called Davis and told him to go to the office. Davis went to the office and said, "Well, we have got orders to go," and I said, "Well, all right," and these fellows then after pushing cars ahead of us, and he asked the conductor to move these cars, and he said, "I have registered out of here and they are in a hurry for this engine, and I want to get it down there."

Q. And so after Davis came back, he said you were ordered to go out?

A. Yes sir, he had the order in his hand and handed it to me, and I read it over.

Q. Now, when you went out, did you go with the tank going east? Which was in front, the engine or the tank?

A. The tank was going east, the engine was west. The engine was backing up.

Q. In coming from Hulbert this way, the engine was fronting west, coming this way? A. Yes sir.

Q. Coming from Hulbert to Brinkley, the engine was fronting west? A. Yes sir.

Q. When you were ordered to go back, or back the engine down to Hulbert, you backed it without turning the engine?

A. Yes sir, we asked permission to turn it, but it wasn't granted us.

Cross-Examination.

Q. Mr. Holloway, how many departments of the railroad did I understand you to say you had worked in?

A. I worked in the Locomotive and Mechanical De-
48 partment, truck and tank department, brakeman and fireman.

Q. Where did you work in these various departments?

A. I worked in three departments in the Iron Mountain shops.

Q. You say you worked in the tank department?

A. Truck and tank builder, yes sir.

Q. You are very familiar then with the methods and the manner in which they are constructed?

A. They are put up on a standard tank, what I mean, a Baldwin or Rogers, something standard.

Q. You can look at the tank of an engine then and take it in [at] a minute? A. No sir.

Q. That is, if there is any glaring defects in it?

A. Well, a tank inspector is a job where it is necessary to have a party to get in under that tank to inspect the wheels.

Q. I mean anything that can be seen just by the tank being out in front of you; you can look at it and take it in in a minute? A. No, I could not.

Q. Well, these things that are perfectly apparent?

A. Well, there is nothing there for a man to see from the outside.

Q. What time was it you say you left Little Rock to go down to Hulbert?

A. We were called at one to leave at two.

Q. That was in the morning? A. Yes sir.
Q. You left at two o'clock?
A. No, we didn't leave at two.
Q. What time did you leave?
A. I don't know what time he registered out. I was over there on the engine.
Q. About what time? A. I suppose 3:00 or 3:30.
49 Q. What time did you get down to Brinkley?
A. It was near noon. I suppose between 11 and 12, when we arrived at Brinkley.
Q. Then how long were you at Brinkley?
Q. We were there until the next morning at one o'clock.
Q. Did you leave Brinkley at one o'clock.
A. No sir, we were supposed to leave at two, but it was about five before we left, on account of the injector of the engine not working.
Q. You left Brinkley at five the next morning?
A. Yes sir.
Q. What time did you get to Hulbert?
A. We got to Hulbert just about noon.
Q. That was the next day after you left Little Rock?
A. That was on the 30th.
Q. You left here on the 29th? A. Yes sir.
Q. Now, how long were you at Hulbert, before you started on your return trip?
A. We registered out of Hulbert at one something.
Q. Of the same day? A. Yes sir.
Q. So that you went down and turned right back?
A. Yes, sir.
Q. It was on this return trip that you took charge of this engine upon which the injury occurred? A. Yes sir.
Q. What time did you get into Brinkley returning?
A. That I am not sure, but I think it was 7:20 when we registered in there.
Q. Then you went to supper? A. Yes sir.
Q. What conversation did you and Davis have about going back? A. Well, I made a "holler" on it.
50 Q. Made a "holler" on what?
A. On going back, backing the engine up.
Q. You did make a "holler?"
A. Yes sir, I did. I said that I didn't want to do it, and asked him to ask the train master to let us turn our engine. There was a turntable right there, and he brought me this message and said that he didn't want the engine turned.
Q. You made a "holler" on it and objected to it, and sent word to the dispatcher to let you turn?
A. Yes sir, but after taking the matter under consideration, Mr. Davis and I had a talk in regard to turning the engine, and it being a case of emergency, I considered if they

wanted me to back the engine up, they would use all the precautions on earth to give me a clear track and clear of all obstructions, and thinking too I could make the trip without any great danger to myself, I agreed to go, they being the master and me the servant. After I took the matter under consideration, I came to the conclusion I could take the run with perfect safety.

Q. You have been reading law since this case came up, haven't you? A. Well, that is not the question.

Q. I just asked you if you haven't been studying the law of this case? A. No sir, I have not.

Q. You mean to tell the jury that you went through all that discussion in your mind?

A. I sat right down on the engine and Mr. Davis and I had that talk?

Q. You swear you went through all that discussion in your mind? A. Something similar.

Q. You objected to going and afterwards you went through a legal discussion of the matter in your mind and then changed your mind?

A. Yes sir, I changed my mind.

[A.] You knew you were going out on a more dangerous business than if the engine was headed forward?

A. Yes, sir I knew it was more dangerous to back up than go ahead, but not so much so that it would be obvious at all.

51 Q. Are you through with your explanation now?

A. Yes sir, I am through.

Q. Did you have any conversation with Mr. Roberts there in the yard about backing the engine up?

A. Mr. Roberts told us on our arrival there that he had asked permission to turn the engine and they said no, before we arrived there. No, he didn't say that. He said he asked them if they were going to turn it and they said no.

Q. I will ask you if you didn't tell the operator there that night or tell Davis, that if you didn't get out of there at once, you was going to bed?

A. I don't remember saying that—no sir, I did not.

Q. Well, is it true or not? A. Well, I couldn't say.

Q. Whether you said it or not, is it true?

A. Well, I wouldn't say. I don't remember what I said. We were quarreling and jowering there for quite a little bit.

Q. Quarreling and jowering about running this engine backward? A. Yes sir.

Q. You don't remember whether you said that if you didn't get out at once you would go to bed?

A. No sir, I don't remember that at all.

Q. How long had you been on the road then?

A. I had been on the road then, at 11:17, 21 or 22 hours.
Q. You had the right to demand rest, didn't you?
A. I had if I wanted it, yes sir.
Q. You could have demanded rest and gotten it at Brinkley? A. I don't know whether I could have gotten it or not.
Q. You had the right to demand it?
A. I don't know whether I have or not on that road. I couldn't say how that is in regard to rest.
Q. You say you didn't know what the rules of the road were? A. I say in regard to rest.

52 Q. So you started out at 11:17. How far did you say you had gone? A. Well, between 12 and 14 miles.

Q. Now, you say that you estimate it was 50 or 75 feet after Davis hallooed before you struck that horse?
A. Something like that, yes sir, to the best of my knowledge.
Q. Don't you know now Mr. Holloway that the engine struck the horse before either one of you knew anything about it? A. No sir, I do not.
Q. You don't know that? A. No sir, I do not.
Q. You state positively then that after Davis hallooed that the engine ran 50 or 75 feet?
A. Something like that, yes sir, as near as I could get at it.
Q. Is seven miles an hour very fast? A. No sir.
Q. If an engine is going seven miles an hour, is it under perfect control?
A. Yes sir, supposed to be under control with proper applications.
Q. Now, which end of the bridge did you strike the horse on?
A. Struck the horse something near the center of the bridge, judging from the scars on the rails there.
Q. How long is that bridge?
A. I couldn't tell you; I didn't measure.
Q. About how long?
A. I walked across it, but I don't have any recollection.
Q. You can form some sort of an idea about how long that bridge is?
A. No, I cannot, because I don't remember anything about it.
Q. But you are undertaking to detail other things that took place. I must insist that you give some idea of about how long that bridge is? A. I have no idea at all.

53 Q. You say you have no idea about how long that bridge was?

A. No sir, I didn't pay any attention to the bridge at all. I was hurt.

Q. You were about the center of the bridge when you struck that horse?

A. Judging from about where the scars, the brake or something had been pulled over, but I never paid any attention to the distance.

Q. What distance can you stop an engine running seven miles an hour?

A. Properly equipped with air, you ought to stop it in two lengths of herself easily.

Q. Suppose an engine is equipped like that one is, how long?

A. I couldn't tell you. I never had any experience before with one equipped like she was.

Q. You don't know how long it would take?

A. No sir.

Q. You allege in your complaint here that the tank was equipped with brakes? A. The tank was, yes sir.

Q. And you allege that the brakes on the tank were in perfect condition, don't you? A. Yes sir.

Q. Now, do you undertake to say that you can ride on an engine from Hulbert to Brinkley and not tell whether there are any brakes on the driving wheels?

A. Yes sir, I didn't pay any attention to it. I have got all I can do when I fire a locomotive to attend to my business, without looking after the engineer's.

Q. When you are firing, what do you look after?

A. I look after my coal, water and lights.

Q. You don't look at anything?

A. I have got no business knowing any machinery at all, because I am not an engine inspector.

54 Q. You just close your eyes to everything else?

A. No sir, I did not.

Q. So far as anything else, you just close your eyes?

A. Yes sir, so far as his work is concerned, it is nothing to me.

Q. I will ask you if there are not a good many grades between Hulbert and Brinkley on the road?

A. I don't remember of but very few grades between Hulbert and Brinkley. No, I don't remember any grades that amount to anything at all.

Q. I will ask you if there is not a good deal of rough track over there? A. Yes sir, it is all rough.

Q. They are doing a good deal of construction work over there? A. Yes sir.

Q. If you are running forward from Hulbert to Brinkley and the brakes are applied to the tender, what effect would be produced then?

A. Produce the effect to slow the train down.

Q. Wouldn't the engine run ahead of the tender?

A. Not supposed to, where it is connected up with safety chains and goose neck.

Q. There is a play in there of 15 or 20 inches?

A. No sir, you are mistaken about that.

Q. Well, what is it?

A. I don't suppose that the play is at the greatest over 2 1-2 or 3 inches at the outside.

Q. When Mr. House had you on the stand, didn't you state there was a play?

A. I said there was a gangway there of 20 1-2 inches from the engine to the tank.

Q. What is the gangway? A. The gangway is an opening.

Q. There is some play though between the engine and tank when it is coupled together? A. Yes sir.

55 Q. I will ask you, when the brakes are applied to the wheels on the tank, if the engine wouldn't jump ahead?

A. The air applied to the tank, with the coal and water on her, nothing but a light train, would be sufficient to hold her perfectly level.

Q. It wouldn't produce a jumping sensation?

A. No, sir.

Q. Well, I will ask you, Mr. Holloway, if there were no brakes on that engine, if that is not a perfectly apparent fact? Where are the brakes located on an engine?

A. Where it is a ten wheeler, they are located on the front.

Q. Well, we are talking about this engine, if it was a ten wheeler or 20 wheeler, or more?

A. Well this was a ten wheeler; she has three drivers on either side. The brakes are located between the two drivers just that way, one applies to each side here, and on the other side the way.

Q. They can be seen perfectly when they are there?

A. Yes, sir, they can be seen.

Q. It is open to the eyes if you look?

A. If a man is on the ground, he can see whether they are there or not.

Q. If he is walking up to the engine to get in it, and he looks, he can see? A. Yes, sir.

Q. Perfectly plain? A. Yes, sir.

Q. So you state now that if the air is applied to the tank, that it wouldn't make the engine sort of jump forward?

A. The weight of the engine is so much greater than that of the tank that it would drag it along perfectly still.

Q. When did you say you first made this discovery about the brakes?

56 A. There at the wreck, where we had the smashup.

Q. Didn't you allege a defect in the brakes?
A. Yes, sir, I said there was a defect in them, I suppose so.
Q. When did you tell Mr. House just now that you made that discovery?
A. Right there at the wreck.
Q. Did you examine it then to see?
A. Yes, sir, I examined to see what was the matter with the whole outfit.
Q. I will ask you, when you filed your original complaint in this suit, why you didn't say something about the defects?
A. Mr. House had charge of that matter.
Q. You didn't allege any defects in the brake?
A. I couldn't tell you what was in it.
Q. You swore to it?
A. Yes, sir, they read it at the time.
Q. You swore to it? A. Yes, sir.
Q. You didn't say anything about any defective brakes?
A. I don't remember what was in it. I read it over.

(Counsel admit that there was no allegation as to defective brakes in the original complaint.)

Q. Now, Mr. Holloway, if there were no brakes on that engine, why would you allege in your amended complaint that the shoes didn't work?
A. Because they didn't work, or was not working at the time.
Q. There wasn't any brakes on there at all?
A. Yes, sir, the brakes were on there.
Q. The brakes were on there?
A. Yes, sir, and hung very low, didn't clear the rail more than an inch and a half after we pulled her back on the track.
Q. Then why do you allege in your complaint that there wasn't any brakes?
A. There was no air connection.
57 Q. You allege in your complaint in the first place that the brakes were defective?
A. Supposed to be.
Q. Then there was an answer filed, in which it was stated that there were no brakes at all on the engine, and then you come back in your complaint and stated that the shoes were defective, if there were any brakes there at all?
Q. You say the shoes were on there?
A. I don't remember about the shoes. The brakes were on there.
Q. You are certain of that?
A. Yes, sir, I am certain of that.
Q. (By the Court): Can the brakes do anything without shoes on to catch the wheel?

A. If it is up tight enough, yes, sir. Of course, the shoe binds and locks.

Q. (Counsel for Defendant): The brakes cannot do anything without shoes?

A. They are not successful, no, sir, but I say you can tighten them up until the brakes will catch.

Q. If there are no shoes on there, it cannot catch?

A. Yes, sir, the brake will catch without a shoe.

Q. But it won't do any good?

A. It will have a tendency to hold as much as it will, but not so much as a shoe, because a shoe is a great deal longer. A shoe is about that length.

Q. Mr. Holloway, what time of night was it you say you left Brinkley going east?

A. Well, I suppose, somewhere about eleven o'clock. I didn't register out.

Q. What sort of a night was it?

A. Well, it wasn't cloudy, thick cloudy, but there was clouds floating over, but it never got thick cloudy until after four o'clock in the morning.

Q. Was it a dark night?

58 A. Yes, sir, it was a dark night.

Q. Was it a foggy night?

A. No, sir, there wasn't any fog, a little mist, but not to amount to anything more than there is in these bottoms all the time.

Q. You made a report to the Company of this accident, didn't you?

A. He asked me some questions there.

Q. Didn't you make out a statement of this injury and furnish it to the railroad company—an accident report?

A. Yes, sir.

Q. I will ask you to examine that, and see if that is the document?

A. That is about the thing of it, yes, sir.

Counsel for Defendant thereupon read the above named report to the jury, as follows:

[59]
Form 267—2M—3-29—1900.

CHOCTAW, OKLAHOMA & GULF R. R. CO.

OPERATED AND LEASED LINES.

REPORT OF PERSONAL INJURY TO EMPLOYES, PASSENGERS OR OTHER PERSONS.

INSTRUCTIONS—A separate blank must be filled out for each person injured, whether the injury is severe or slight, by each employe present.
If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto.
Every question ***bearing on this accident*** must be ***answered fully.***

1. A. Name, residence (street and number) and P. O. address of person injured? Will Holloway, 617 Newton Ave.
   B. Age? 23. Occupation? Fireman. Nationality? American.
2. A. Married or single? Single. If married, name and residence of wife or husband?
   B. Names and ages of children?
   C. If single, names and addresses of father, mother and nearest relatives? Mrs. L. B. Holloway, Searcy, Ark.; Mr. and Mrs. T. H. Davis, Rosebud, White Co., Ark.
3. A. Employee, passenger, traveler on highway, or tresspasser? Employe. If employee, how long in service of this company, and in what capacities? 4 days; locomotive fireman. Date last entered in this company's service? Oct. 28.
   B. If passenger, where from and destination? Ticket or pass?
   C. If unknown, give full description (height, weight, hair, eyes, marks and clothing), and state what articles found on person?
   D. Circumstances in life? In good. How much accident or life insurance? None.
4. State fully the nature and extent of injuries, and prospect of recovery? Two ribs fractured on left side, left kidney badly bruised,
5. A. What was done with and for the person? Nothing. By whose direction? No one.
   B. Name and address of surgical attendant? Dr. E. Sharpe, 500 E. Adams St.
   C. If dead, state disposition of remains?
6. A. Give date and hour (day or night), and state exact point where accident occurred? Oct. 30, at 11.40 p. m., Trestle No. 547.
   B. If at night, was it very dark? Yes, very dark. Kind of weather? Foggy.
   C. Did the accident occur on or near a crossing? Yes. Public or private? Don't know. Name of crossing? Don't know. Distance and direction from same? Don't know.
   D. Was view of trainmen or injured party obstructed? If so, by what? State fully.
   E. On main or side track? On main. Curve or straight line (state whether curve to right or left)? Straight. Up or down grade? Level track.
7. A. Train No.? Light engine. Conductor, Yardmaster or Foreman?
   B. Engine No.? 3. Engineer? Davis. Fireman? W. Holloway.
   C. Baggageman? None. Head Brakeman? None. Rear Brakeman and Porter? None.
   D. Switchman? None.
   E. Give names of all other employees present? Engineer Davis.
   F. No. cars in train? None. No. loads? None. No. cars with air brakes? None. Speed of engine or cars at time of accident? 7 miles per hour.
   G. If train late, how much? No. In what direction train moving. East. If backing up, who was on rear end?
8. State your location with reference to point of accident? What were you doing? Putting in a fire.
9. Where was injured person, and what was he doing at time accident occurred? Was putting coal in fire box.
10. Give full particulars of cause of accident? Special engine No. 3 was backing up from Brinkley to Hulbert without headlight or pilot on back end of engine, ran into a horse on trestle No. 547 derailing tank and engine.
11. A. If person was injured in coupling cars, was he using coupling stick? Who examined coupling apparatus? Was it in good order?
   B. State kind of draw-bars? Were draw-heads of equal height?
12. Give initials and Nos. of engines and cars directly connected with this injury? Condition of same? If in bad order, were they so marked?
13. A. Was there any defect in track, bridges, buildings, rolling stock, machinery, tools, or other appliances that caused, or may have assisted in causing, the injury? And if so, state fully?
   B. If there was any defect, how long had same existed? Had same been reported? If so, when, by whom, and to whom?
   C. Did injured person know of defect?

[60] [Continue on other side.]

14. What precautions were taken by the person injured, or by any one, to prevent the accident? Engineer run very careful.

15. In your opinion, what further precaution could have been taken by the person injured, or by any one in any way? The company should have had a headlight on back end of engine, also a competent man to look out for danger.

16. Who was in charge of the engine? Engineer. Was it properly handled? Who was in charge of the train, or cars, at time of accident? Had no cars.

17. A. Was whistle sounded? No. Was bell rung? No. By whom? Was bell rung continuously? No.

B. Were any other signals or warnings given, and by whom, and in what way? No.

C. For what purpose were these signals or warnings given?

D. Did the person for whose benefit they were given act upon them? If not, why?

E. When and where, with reference to accident, was whistle sounded and bell rung? What distance did engine, or cars, run after accident? 3 car lengths.

18. What does injured person say as to extent of his injuries? Cannot tell just yet.

19. A. What does injured person say was cause of accident? Horse being in trestle.

B. Who, if any one, does he blame? Company. In whose hearing was injured person's statement made?

20. Was injured person insane, intoxicated, blind or deaf?

21. In your opinion, was any employee at fault? If so, who, and in what way? Chief Desp't.

22. In your opinion, was injured person at fault? If so, in what way? No.

23. Was any one at fault, and if so, who? Yes, the company, for backing engine without headlight.

24. Name, occupation, postoffice address, and residence of every person who witnessed the accident, or can give any information regarding it. Attach hereto the written statements of such persons, signed by each.

NAME.	OCCUPATION.	RESIDENCE AND POSTOFFICE. (Give Street Number).
Will Holloway	Fireman	617 Newton Ave., Argenta.
Will H. Davis	Engineer	300 Magnolia St., Argenta, Ark.

26. REMARKS: State fully any further information you can.

(Sign here) WILL HOLLOWAY,

Month, Oct., Day of month, 30. (Occupation) Fireman,

Dated Argenta, 1900. (Address) 617 Newton Ave., Argenta, Ark.

CHOCTAW, OKLAHOMA & GULF R. R. CO.

PERSONAL INJURY REPORT.

Name of party injured, DAVIS AND HOLLOWAY.

Residence, North Little Rock.

Occupation.....

Place of accident.....

Date of accident.....

NOTE: The within blanks *must in all cases be fully and accurately filled out* by Conductors, Trainmen, Agents, Foremen, or by parties in charge of party injured, *and as soon as possible* after the injury is inflicted, and forwarded by *first passenger train* to the Superintendent.

61 Q. Now, Mr. Holloway, did you make any other statement of this accident?

A. Why, the claim agent came over and I made something of a statement there, but I never saw it. He never read it to me after it was made.

Q. Where was it made? A. At Robin's drug store.

Q. When was it made? A. I don't remember.

Q. About what time?

A. I don't have any idea. I couldn't tell you whether it was November or December.

Q. Have no recollection?

A. No sir, none at all about it.

Q. Do you remember about what you said to him?

A. No sir, I do not. It was not read over to me after I made the statement at all.

Q. You remember what you said, don't you?

A. No sir, I do not. It was questions asked and answered.

Q. You don't remember what statement you made?

A. No sir.

Q. I will ask you to look over that and tell whether that is the statement or not?

A. I remember making part of it, and there is part of it I don't remember.

Q. Do you state you didn't make the balance of it?

A. I don't know. I wouldn't state. I don't remember. The questions were asked me and I was suffering.

Q. Is that a correct statement? Is there anything in that statement that is not so?

A. I don't remember. A thing of that kind a man can't carry in his head.

Q. Are these facts true whether you stated it to the claim agent or not? A. I can't say.

62 Q. You know what happened when you was injured?

A. Of course, I know what happened.

Q. I will ask you if there is anything in that statement that happened in connection with that accident, that is not true. If there is, just read it over and point it out.

(Statement is handed to witness who reads same.)

A. Yes sir, there is a part here I don't remember anything about. "I didn't see a copy of this order to run backwards." I did see it and read it. I don't remember that either about not seeing the back of the tank. I don't remember saying anything of that kind in it at all.

Q. With these exceptions, this statement is correct?

A. Yes sir, that is just about as well as I remember.

Q. (By the Court): Do you remember of having made that statement at all?

A. Something like that. Something on the order of that. I didn't sign any statement at all.

Q. (Counsel for Defendant): You say you don't remember about the date this statement was made?

A. No sir, I do not.

Q. Now, Mr. Holloway, who did you make this statement to, or who did you make the statement to over there in Argenta?

A. Made it to some lady or typewriter there is all I know.

Q. Who was she with?

A. Kilpatrick, I believe was his name.

Q. You made a statement to Mr. Kilpatrick and his lady typewriter? A. Yes sir.

Q. Now, if this is the statement that you made, why you made everything contained in here except those specified?

A. I don't remember anything about what the statement was. Of course, I couldn't keep a thing of that kind on my mind and the statement was not read to me.

Q. If you made these statements that you pointed out, they were not correct?

A. I don't remember anything about what the statement was.

63 Q. If you made them, or if they have got them down here, they are not correct statements of facts?

A. No sir, that is not facts in the case.

Q. Everything else that is set down here is correct?

A. I don't remember whether it is or not.

Q. You are testifying about this accident? A. Yes sir.

Q. These other things that are stated in here are correct, except those things that you have pointed out?

A. Well, I would have to read it very carefully and see. I have just merely looked over it. I don't remember anything about what the statement was.

Q. (By the Court): The question is not whether the statement was reduced to writing correctly, or whether you made the statement, but he is asking you now whether this statement was not true, what actually happened, and if not, to point out what parts of it is not true?

A. Well, your honor, I don't remember the statement at all.

Q. (Counsel for plaintiff): Just read that over line by line, and wherever there is a place that is not true, just call attention to it?

A. "We came into Brinkley about 7:30, I do not remember just the time we registered in there. We went over and had supper and came back. We had orders to take engine 3 W. & B. to Hulbert backwards. This engine was headed west and had a headlight on the front end. She had been used as a switch engine, and did not have a pilot on either end, and no headlight on the back end of the engine going east when

backing up. No conductor or brakeman in charge or messenger brakeman in charge. Our orders read to back up engine 3 from Brinkley to Hulbert. We registered at Brinkley at 11:17 and were running west to Hulbert" (that is a mistake, that ought to be east) "at the rate of seven miles an hour and on trestle 547 struck a horse in the center of the trestle. The tank left the track the second tie from the trestle at
64 the east end. The tank left the track on the south side of the track. I was putting in the fire at the time the accident occurred, and on finding that we were in a wreck, made an attempt to leave the engine." That is wrong there, "putting in a fire at the time the wreck occurred." I was putting in a fire when Mr. Davis made the halloo to look out. That is not like my statement at all.

Q. (Counsel for Plaintiff): Read that again. I don't understand your last remark?

A. It says the tank left the track the second tie from the trestle at the east end. I was putting in fire at the time the accident occurred, and on finding that we were in the wreck made an attempt to leave the engine. Well, I made an attempt to leave the engine, as my statement this morning, just as I was crawling between the cab, we struck the horse. I was trying to find the step on the right side of the cab to get my foot on it so as to balance myself and keep myself from falling. "I was putting in a fire at the time the accident occurred." That is a mistake—"made an attempt to leave the engine between the tank and the cab, and was caught between the tank and cab on the south side through the small of my back. The engineer had left his seat and turned to release the air, which caused the tank to drop down hill and release me. I left the engine on the engineer's side making a jump of 18 feet. We had plenty of time while we were in Brinkley between our arrival and departure to have turned the engine around, if we had been ordered to. I did not see a copy of this order to run backwards from Brinkley to Hulbert until after we had gotten to the water tank east of Brinkley." (That is a mistake; I did see it and read it.) "I saw this order by talking with the engineer about the danger of going back, and made the remark to him that I had just as soon go out and commit suicide as to make the trip backwards." (That is not the words I used. I said it was the first time I was ever ordered out to commit suicide. That was when we first had our jower in the yards at Brinkley, before we took the matter under consideration, that we could make the
65 run in perfect safety after consulting.) "It was a dark foggy night." (It was dark, and the fog was a light mist. There was no heavy dense fog at all, but a light mist of a fog.) "It was impossible to see the back end of the tank."

(I don't remember anything of that.) "We could not have taken the headlight off the front end and put it on the back end, because it was one of those stationary headlights. While our engine was standing on passing track near the station at Brinkley, I knew they were having some controversy in regard to turning the engine, and the engineer would between times ask what I thought about it, and he consulted me in regard to backing the engine up, and I knew by this conversation that he was endeavoring to have the engine turned and that he had been refused. When he came out to start, we had orders to run to Hulbert with engine 3 backward very carefully, and we were running very carefully, not going over six or seven miles an hour, and we stopped this engine less than three car lengths after hitting the horse." (That is a mistake.) After the wreck, and we were both hurt, we sent the message asking them to come as soon as possible. Dr. Edwin Sharp, No. 23 Newton Ave., Argenta, attended me."

Q. (Counsel for Defendant): Now, Mr. Holloway, what did you all go down to Brinkley for?

A. We went there on account of engine 33 being disabled in the pit and we took this 3 back there to use in the pit.

Q. I say to Brinkley. What did you double back to Brinkley from Hulbert for? You had been down to Hulbert; now, why did you come up to Brinkley on this engine, No. 3?

A. The traveling engineer said he was sending her in to the shops, that is where she was going for an overhauling.

Q. You said something this morning about something that you packed, didn't you,—I don't remember what it was—about packing something, or wrapping something?

A. That was the hose right under the tank.

Q. What was it you said you did to that?

A. Wrapped it. It was leaking and we wrapped it with some packing so we could get water in the boiler.

66 Q. Where is the tank situated? Where did you have to go to do that work?

A. Right under the gangway, right under the front trucks of the tank.

Q. You got under there and wrapped it?

A. Just sat down on the edge of the ties on the outside—rubber hose.

Q. What else was it you said you did?

A. That is all we did. Mr. Monroe, the traveling engineer, remarked to us that they had put a car box brass in the pony truck; that is all he had to put in it, and that we would have to watch it, and if it run hot, we would have to stop and oil and cool it, but it didn't run hot and we didn't fool with it.

Q. You said something about the bad condition of the door to the fire box, too, didn't you?

A. The top hinge was broken off.

Q. And you say the traveling engineer had sent you all down with the engine to take it in the shop for an overhauling?

A. No sir, Mr. Davis asked him, he said, "What is the matter with her?" He said, "She has got to go in the shops and be overhauled all over."

Q. The traveling engineer was down at Hulbert?

A. He was superintending the exchange of engines, oil, waste and cans and everything.

Q. Now, let us go back to the scene of the accident. What was it you said about being out on the steps there swinging out to get down?

A. No sir, I didn't say I was out at all. I had hold to the tank with this hand and to the edge of the cab with this one, just in that shape, and I was trying to reach the step with my right foot so as to balance myself and catch myself on the ground, and before I could catch the step with my foot, we run back there and run into the horse, and of course, went over, and we got in the mix-up, and I got caught with the tank and the cab.

67 Q. You were standing with one foot reaching down to the step at the time you got caught? A. Yes sir.

Q. Just explain to the jury how that engine was situated when the wreck took place, where the tender was and where the engine was, and just what it did when it went off the track?

A. Why, after striking this horse, run up on the trestle and hit the horse, and I was trying to get out of it, as to what it done, I couldn't tell you that.

Q. Well, after you got down, you stated this morning that you examined the engine; just state how the engine stood?

A. The rails on either side were turned over and the engine was on the bottom of the rail.

Q. Were the wheels of the tender on the bottom of the rail? A. No sir, they were off.

Q. How much off?

A. I suppose something like 20 or 30 inches.

Q. It had sort of gone around to one side?

A. Yes sir, it veered a little as it left the track.

Q. About how much had it veered?

A. About 30 inches, I suppose, somewhere between 20 and 30 inches.

Q. Which way did it veer? A. To the south.

Q. Which side did you go out on?

A. I went out on the engineer's side.

Q. On which side of the engine does the engineer sit?

A. The right hand side.

Q. Now, Mr. Holloway, where did you go after the wreck that night?

A. I got out and laid down between two ties, with my head against the rail.

Q. Didn't you walk up the track about 100 yards or so?

A. Flagged these boys coming in on top of me.

68 Q. How far up the track did you go?

A. Anywhere from 75 to 100 yards.

Q. You walked up there? A. I did.

Q. Didn't you get on that engine while it was in motion?

A. No sir, I did not.

Q. You are positive of that?

A. I am positive that the engine stopped and I got on when they stopped and stood right there.

Q. How long did you stay there that night before you left?

A. I staid there until the next morning about 6:30 or 6:40.

Q. Staid right there at that spot?

A. Right there at the wreck? A. Yes sir.

Q. Where did you go from there?

A. I went down to Palestine.

Q. Wasn't there a passenger train down there coming this way? A. Two of them.

Q. This wreck laid them out? A. Yes sir.

Q. Did you come into Little Rock on one of them?

A. No sir, did not; didn't have any pass, and they wouldn't let us come without a pass.

Q. Did you ask to come in?

A. I did, sent a message and asked to come in on the first train.

Q. When you got here, where did you go?

A. Went in the depot, and laid down on a seat.

Q. When you got into Little Rock? A. Right to our room.

Q. How far is it from the depot to your room?

A. About six blocks.

Q. Did you walk or ride? A. I walked.

Q. Now, Mr. Holloway, you allege here, as your sec-

69 ond ground of negligence that the railroad company had not provided for and did not have a headlight on the back of the engine? A. Yes sir.

Q. There was no headlight on the back of that engine when you started off that night? A. No, sir.

Q. Then, as your third ground, you allege that in not placing a man on the foot board, in front of the engine, with a white and red light. There was nobody on the front end of the engine, that is on the tank, when you left Brinkley?

A. No, sir.

Q. Fourth, in not providing for and furnishing said engine with a pilot or cowcatcher. There was no pilot or cowcatcher on the tank end of the engine that night?

A. No, sir.

Q. You allege as the fifth ground, that it was negligent, because it was a square or box engine; that is, the tank or tender did not slope backward or downward, so as to give a better view in front of the engine? A. Yes, sir.

Q. That was one ground of negligence, you allege?

A. Yes, sir, I suppose so, if it is in there.

Q. That is the kind of an engine it was—a square box engine? A. Yes, sir.

Q. It obstructed the view, did it?

A. Yes, sir, to a certain extent.

Q. Mr. Holloway, you know Mr. Whitmore, don't you?

A. I don't know whether I would know him or not. I saw him once or twice.

Q. You know the engineer that was on that freight engine that came up that night that you flagged down, didn't you?

A. Yes, sir, I believe that was Whitmore. I didn't know any of the boys over there. I was never with them any. I have always been with an Iron Mountain crew, and I didn't know many of these boys.

70 Q. I will ask you if you didn't tell him that night that what hurt you received, that you got it entirely from jumping from the engine?

A. No, sir, I didn't say anything of that kind. I didn't have any conversation with Mr. Whitmore that night at all.

Q. Didn't you get up in his engine and ride down a piece with him?

A. We rode, I suppose, probably fifty yards to the wreck, and we were talking about it and he was asking me how it happened.

Q. You are sure you didn't tell him that you got your injury in jumping from that engine?

A. No, sir, I didn't make any statement of that kind at all.

Redirect Examination.

Q. I neglected to ask you one thing before noon. I will ask you if this is the book of rules that the Company furnished you, and if you had that book at the time you were injured?

A. Yes, sir.

Counsel for Plaintiff here read the following rules from said book to the jury:

"2. In addition to these rules, the time-table will contain special instructions, as the same may be found necessary. Spe-

cial instructions, whether in conflict with these rules or not, which may be given by proper authority, whether upon the time-table or otherwise, shall be fully observed while in force."

"3. The head of each department must be conversant with the rules, supply copies of them to his subordinates, see that they are understood, enforce obedience to them, and report to the proper official all violations, and the action taken thereon."

"4. Every employe of this company whose duties are in any way prescribed by these rules must always have a copy of them at hand when on duty, and must be conversant with every rule. No employe, as above, will be permitted to engage in the company's service without first passing the prescribed examination on these rules. He must render all the assistance in his power in carrying them out, and immediately report any infringement of them to his immediate superior."

"5. The fact that any person enters, or remains in, the service of the company will be considered as an assurance of willingness to obey its rules. No one will be excused for the violation of any of them, even though not included in those applicable to his department."

"6. If in doubt as to the meaning of any rule or special instructions, application must be made at once, to the proper authority, for an explanation. Ignorance is no excuse for neglect of duty."

71 "9. Every employe of one division, when within the limits of another division, will be under the authority, and must conform to the orders of the superintendent of that division."

"34. Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two red lights in the rear. Freight trains will display an additional red light in the cupola. Yard engine must display two green lights instead of red, except when provided with a headlight on both front and rear."

"73. When a train is being pushed by an engine a white light must be displayed on the front of the leading car at night, or when the train is obscured by fog or other cause."

"79. All trains are designated as regular and irregular. Regular trains are those represented on the time-table and may consist of one or more sections. All sections of a train, except the last, must display signals, as provided in Rule 36. Irregular trains are those not represented on the time-table. An engine without cars, in service on the road, shall be considered a train."

"109. All messages or orders respecting the movement of trains or the condition of track or bridges must be in writing."

"111. Irregular trains must not be run without an order from the superintendent."

"152. Enginemen must use great care to avoid striking stock. If necessary, they must bring the train to a stop. Should any stock be killed or injured, the engineman must report same on the prescribed form."

"154. Whenever it becomes necessary to back a train it must be done with great care under cover of danger signals, and with a man constantly on rear car."

"500. Special orders, directing movements varying from or additional to the time-table, will be issued by the authority and over the signature of the superintendent, and only one person at a time shall issue such orders on any dispatcher's district. They are not to be used for movements that can be provided for by rule or time-table. They must not contain information or instructions not essentially a part of them.

They must be brief and clear, and the prescribed forms must be used when practicable; and there must be no erasures, alterations or interlineations.

Transfers of orders from one dispatcher to another shall be in writing in the train order book, dated, timed and signed, with complete list of unexpired orders; or if done by telegraph the above shall be transmitted, an understanding returned and complete [—] given before the authority is exercised by another person."

"501. Each order must be given in the same words to all persons or trains directly affected by it, so that each shall have a duplicate of what is given to the others. Preferably an order should include but one specified movement."

72 "503. Orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to a person acting as pilot. A copy for each person addressed must be supplied by the operator."

"504. Each order must be written in full in a book provided for the purpose at the superintendent's office; and with it must be recorded the names of trainmen and others who have signed for the order; the time and signals, showing when and from what office the order and responses were transmitted; and the train dispatcher's initials. These records must be made at once on the original copy, and not afterward, from memory or memoranda."

Q. You stated awhile ago, in response to Mr. Pierce's question here, that the way this tank was built, that it to some extent obstructed the view? A. Yes, sir.

Q. How far could an engineer, standing in the cab where you were, and where it was your duty to stand, how far in advance it would be before the range of vision would reach the ground in front of it?

A. Why it would be between 60 and 70 feet to look over.

Q. That was where the vision would strike the ground?

A. Yes, sir.

Q. If the horse was on the ground, you could still get nearer the horse; you could see the horse even closer than that?

A. Yes, sir, see the bulk.

Q. Of course, the higher the object was, the nearer the engine— A. The nearer you could see it.

Q. How far in your opinion that night could you have seen this horse ahead of you?

A. Why, I suppose a man would have seen the horse anywhere from 50 to 65 feet ahead of him.

Q. Now, you stated this morning something about these brakes. Brother Peirce asked you about your amendments. I will ask you when you gave me the information upon which this amended complaint was based?

A. After you had made the other, you came up and I called your attention to the fact that you had left it out, and you said well, you would just make the amendment to that effect.

73 Q. How long was that after I had prepared that complaint and sent it to Lonoke?

A. I don't remember how long that was.

Q. This suit was originally brought in Lonoke, wasn't it?

A. Yes sir.

Q. You went up to Searcy some few weeks, as soon as you got able—your people, some of them, live at Searcy?

A. Yes sir, my home is there.

Q. I will ask you whether or not you left that information with me before you went up there?

A. I don't remember right now whether it was before or after I went back.

Q. About how long was it, after I drew the first complaint, before you told me about the brakes being defective, according to your best judgment?

A. Why, it was some time after that.

Q. I will ask you this: Do you remember of me taking a memorandum from you of additional data that I wanted to include in that complaint?

A. Yes sir, I brought you back a memorandum.

Q. Do you remember whether that was before or after you went to Searcy?

A. Well, I don't remember whether that was before or after.

Q. You stated this morning, that you didn't know what it was contended by the company, or, at least, didn't know that there was any brakes at all there, or at least, that is my impression, until you read the answer here, or I read a copy of the answer? A. Yes, sir.

Q. Now, at the time you made this complaint, you stated here that the brakes were defective and they wouldn't work. Now, I will ask you to what extent your attention was called to brakes that night that gave you that information?

A. No more than just merely passing by.

Q. Did you notice the shoes?

74 A. Why, I don't remember whether there were shoes. It seems to me there were shoes on the brakes, but it might be possible I may be mistaken about that.

Q. Did these shoes when the air was turned on clasp the wheel? A. Yes sir.

Q. I mean that night?

A. No sir, there wasn't nothing clasped these wheels at all.

Q. If the engine had been properly equipped with brakes and the air in condition with the air turned on, would the effect of that be to clasp these shoes on the wheels?

A. Yes sir.

Q. Now, you say the night of the injury, when the air was turned on, these shoes, if they were on there at all, didn't clasp the brakes? A. No sir, they didn't clasp them.

Q. You stated this morning also that you had no occasion, it was not a part of your duty as a fireman to look after the brakes?

A. No sir. It is in no ways connected with my affairs at all.

Q. In fixing this pipe that is near the tank, did that bring you in touch with the brakes under the engine?

A. No, sir, I was behind the fire box at the end of the engine, sat with my back to the engine, my face to the back of the tank, working on the hose in front of me.

Q. Unless your attention had been called especially to the brakes, you wouldn't have seen them?

A. No, sir, I never pay any atention to anything of the kind, unless an engineer will ask me to do something for him.

Q. Did you suppose at the time you left Brinkley the brakes were in proper working order? A. Yes sir.

Q. Did you ever work on an engine before in your life that was not properly equipped with brakes?

A. No sir. I have had, once in my life, to cut out the tank brakes because it wouldn't work. That is done by a valve under the cylinder.

75 Q. Now, if there had been brakes on this engine, when the air was turned on, what effect would that have had upon the engine?

A. It would have held the tank and the engine the same distance apart, and kept them perfectly steady.

Q. Can an engine and tank be stopped, where the brakes are in proper order, properly equipped, when you have the brakes on the engine and tank both, than it can with just brakes to the tank? A. A great deal quicker.

Q. Which is the heavier, the engine or the tank?

A. The engine is several times heavier than the tank.

Q. Then I understand you to state the effect of turning on the brakes, would be to hold the tank and the engine the same distance apart? A. Yes sir.

Q. And they could be stopped quicker with proper appliances than they could if you had had no brakes upon them?

A. Yes sir, the weight of the engine alone, with the air applied to the wheels, would stop it almost instantly.

Q. Did you see the horse after it was run over?

A. Yes sir.

Q. Did the engine pass entirely over the horse?

A. Yes sir, engine passed over the horse about ten feet. The horse was laying up in front of the engine; everything passed clear over it.

Q. You stated while ago in cross-examination, that the engine was derailed, and that the rails were turned upside down?

A. Yes sir, they were turned very near over.

Q. Explain about these shoes, how they are made, so that these gentlemen can understand how the shoes are made to operate on the wheel?

A. The shoes are very large and very heavy; they are something like that long, and I suppose, about five inches wide, and say 2 1-2 or 3 feet long, and they are in the shape of the wheel, and there is a plunger that works from the air valve down and throws each brake to its wheel.

76 Q. These shoes are made in a semi-circular shape and when the air is applied, these shoes are clasped right around the wheel? A. Yes sir, perfectly tight.

Q. How many wheels did this engine have on each side?

A. Three drivers on each side.

Q. You mean the large wheels?

A. Yes sir, three large wheels.

Q. These small wheels, what part of the engine are these?

A. The pony truck.

Q. Did you have any occasion to do any work on this engine at that point where the apparatus of the brakes was constructed or made, after you got onto that engine? A. No sir.

Q. Did you have anything to do about the engine that your attention would have been called to the brakes, whether they were in condition or out of condition?

A. No sir. I was only off my engine once from Hulbert to Brinkley, only got off one time to wrap the point.

Q. That was at a point where you could not see the brakes?

A. No sir, I couldn't see them at all. I was just on the corner of the tank, just sat on the corner of the tie and wrapped that hose.

Cross-Examination.

Q. Mr. Holloway, I will ask you if these amendments you were asked about by Mr. House were given to him before the first of this term of court?

A. I couldn't tell you, to save my life; I don't remember when it was; have no recollection about it, I just remember giving him the memorandum.

Q. Did you give him all the memorandum at the same time? A. No sir, I didn't give it—

Q. Was it while the case was pending at Lonoke?

A. I couldn't tell you to save my life. I don't remember much about it.

Q. Now, Mr. Holloway, you say that the brakes
77 didn't clasp this night. How do you know they didn't?

A. There was nothing clasped to the wheel.

Q. How do you know they didn't?

A. I passed by the engine with my torch.

Q. Afterwards?

A. Yes sir, and I didn't see the brakes clasped to the wheel.

Q. If there had been any on there, they would have been released then?

A. No sir, the air stood right into the emergency, until after everything was out and over with.

Q. You don't remember whether there was any shoes on it at all or not?

A. No sir, I do not. I am as liable to be mistaken as anybody else, but I think I am right about it.

Q. Didn't you say while ago that the way you got out from the place you were fastened there was by the engineer releasing the brakes? A. Yes sir, I did.

Q. So that if the brakes had been clasped that night, when the engineer released the air, it would have released the brakes?

A. Yes sir, but as I said, didn't he throw it in the emergency immediately on my falling, and we both left the engine?

Q. Did you go to the company's hospital at any time?
A. No sir.
Q. They have got a hospital?
A. I didn't know at that time that they had any at all.
Q. Didn't the company physician come to see you?
A. On the 11th day after I was hurt, he came there and said some one had neglected to report me being sick to him, or being hurt.
Q. You didn't have him to examine you, or didn't ask him to wait on you?
A. That was just with him. I told him he was at liberty to do so.
Q. You did?
A. Yes sir, and he made the remark that I had as fine a physician and surgeon as there was in the town, and I would abide his decision.

78 Will Barger, a witness for Plaintiff, testified as follows:

Q. What is your profession or business?
A. Brakeman.
Q. Are you in the employ of the Choctaw Company?
A. I am.
Q. Were you in the employment of that railway on about the 30th of October last?
A. I have been here ever since the 10th day of April a year ago.
Q. Were you fireman in the service of the Choctaw, Oklahoma & Gulf Railroad last November a year ago?
A. No sir, I was brakeman. I have been braking ever since I have been in the employ of the company—at Hulbert, about that time, on a work train.
Q. Are you acquainted with engine No. 3 W. & B.?
A. Yes sir.
Q. Did you ever have occasion to work with it?
A. Yes sir.
Q. Do you remember the occasion when Mr. Holloway claimed to have been injured by this engine coming in collision with a horse?
A. I don't know what date it was, but I remember the time of the trouble. I heard about it, heard the boys speak of it.
Q. Had you any knowledge of this engine before that injury occurred? A. Yes sir.
Q. What was the condition of the brakes of this engine?
A. She had air on her tank, but none on her drivers.
Q. How long before Mr. Holloway got hurt did you know it was in that condition?
A. I don't know just exactly how long; it was quite a little bit though.

Q. Several weeks you think? A. Yes sir.

Q. Did you work on that engine down there at Hulbert?

A. Yes sir, we had her in the pit.

79 Q. Were you fireman or were you brakeman?

A. I was brakeman.

Q. You say at that time that this engine No. 3 W. & B. had no air on its brakes? A. Had air on the tank.

Q. Had none on the engine. Do you know whether the apparatus or brakes were there, or whether there was any brakes there at all or not?

A. As far as I can remember, I don't think there was. There might have been without my seeing them. I don't think that there was any.

Q. You know there was no air that could be applied to the engine?

A. Not to the engine. There was on the tank.

Cross-Examination.

Q. Don't you know that there wasn't any brakes on the driving wheels of the engine?

A. I couldn't say positively, but I don't think there was.

Q. Aren't you pretty positive that there wasn't any brakes on there? A. I never did see any.

Q. If there had have been, you could have seen them?

A. Yes sir.

Q. (By the Court): Can't you tell positively? Did that engine at that time have brakes on it?

A. Her air was not connected with the engine. It only had air brakes on the tank.

Q. But that is not the question. Did they have brakes, brake shoes, on the engine? A. No sir, there was not.

Q. (Counsel for Defendant): There were no brakes on the engine? A. No sir.

80 Q. Was any of the rigging or gearing on the engine that the brakes were fastened to? A. No, sir.

Q. What position do you say you occupied then?

A. Brakeman.

Q. Are you still in the employ of the company?

A. Yes sir.

Q. I will ask you if it is possible for a man to ride on the engine from Hulbert to Brinkley over that track, with brakes on the tender and no brakes on the engine, and be ignorant of the fact that there are no brakes on the engine?

A. No sir.

Q. Just explain to the jury why?

A. Well, if an engine has brakes on her tank and none on her drivers, in making each stop, the tank would hold to the

engine, would bump up against her, because it has nothing there to hold the wheels of the engine.

Q. If a man is on an engine, and there are no brakes on the engine, but brakes on the tank, he can tell by the movement of the engine whether there are any brakes on the engine, couldn't he? A. In stopping, yes sir.

Q. I will ask you if a good deal of that track is not very rough, so that a man would be more likely to ascertain that fact than not? A. It was when I was there.

Redirect Examination.

Q. Now, Mr. Barger, what did you mean awhile ago, when you stated, in response to my question, that you wasn't certain whether there were brakes on there?

A. There were no brake shoes, because the air was not connected. There wasn't any air on it at all.

Q. Were the shoes there themselves, but no air?

A. No sir.

81 Q. Well, what did you mean when you stated awhile ago that you wasn't certain whether there was any shoes, or whether the brakes themselves were there or not, but the air wasn't turned on?

A. Well, you asked me if it had any air on the drivers, and I am sure they had no apparatus there to work it with.

Q. You stated while ago that you wasn't certain about that? A. Yes, sir, I did.

Court: He said, "I don't think it had any brakes on, but I don't know positively."

Q. You stated in running an engine from Brinkley here that you could tell because one would bump up against the other. You mean when the tank is being run in front of the engine? A. In backing up?

Q. Yes, sir?

A. Why in applying the air, your shoes would work on your tank and the engine would shove it.

Q. That is when the engine is running the rear of the tank, the tank running in front?

A. Yes, sir, that is about the way it would work.

Q. Now, let us turn the engine on front of the tank. There would be no bump then if the engine was running in front of the tank?

A. It would drag it.

Q. Suppose you would go along very slowly, no occasion for going rapidly?

A. If he wasn't going very fast, why it wouldn't make much difference.

Cross-Examination.

Q. You stated on reflection that you are certain that engine didn't have any brakes on the drivers, and none of the apparatus for brakes, didn't you? A. Yes, sir.

Q. The brakes were only on the tank?

A. Only on the tank, that is all.

Q. I will ask you the question again, Mr. House kind of confused you, I will ask you if the bumping sensation is produced that you speak of when the engine is running ahead of the tender, or when the tender is run ahead of the engine?

82 A. Why, in backing up, when you put your air on, that holds your tank, well the engine is bound to bump up against it.

Q. Suppose the engine is running along in front of the tank, and you apply your air to the tank, what effect is produced then?

A. It just drags it. It depends on how fast you are going.

Q. Wouldn't that produce bumping too—the engine jumping along in front of the tank?

A. Yes, sir, I think it would.

Redirect Examination.

Q. That would depend upon the speed you are running?

A. Yes, sir.

Q. (By the Court): What speed would you call speed? How many miles an hour would it be?

A. Well, going ten miles an hour, it would have some effect, but a person running slow.

Q. What do you call slow?

A. Four or five miles an hour.

Q. (By the Court): How in running 7 or 8 miles an hour?

A. It would be about the same, I guess.

Q. (By the Court): It would be noticeable? It would be felt? A. Yes, sir, I think it would.

Q. (By the Court): If it runs seven, and if it runs three or four or five?

A. Running about four miles an hour, you couldn't tell it much.

Q. (Counsel for Plaintiff): The engine is much heavier than the tank? A. Yes, sir.

Q. An engine running along at the rate of 6 or 7 or 8 or 10, or 15 miles an hour, makes a good deal of noise?

A. Yes, sir.

Q. You put on the brakes which clasp the wheels of the tank, but don't clasp the wheels of the engine in front, now then wouldn't the tank keep the same space from the

83 engine, with the engine in front, that it was when the brakes were applied? A. I don't think it would.

Q. Why not?
A. Why it would be dragging on the engine.
Q. What would be dragging on the engine?
A. The tank.
Q. The tank is connected with the engine by means of a goose neck, isn't it?
A. Yes, sir, with a link and chain.
Q. How could the tank be dragging on the engine when it is only connected with a goose neck?
A. It would be the slack in it.
Q. But suppose the engine is going in front, there would be no slack as long as the engine was going, would there?
A. There would be in stopping, yes, sir.
Q. Wouldn't that depend entirely upon the grade? Suppose you were going an up grade, wouldn't the tendency then be for the tank to hold backwards, as soon as the brakes were released? A. Yes, sir, and hold it.

84 Mr. Jos. W. House, Attorney for Plaintiff, testified as follows:

I wish to state that Mr. Holloway called me, through a relative of his or himself one, I don't remember which, to come over to see him a few days after this injury is alleged to have occurred. I took a statement from Mr. Holloway that day. He was suffering very greatly, but I took the statement from him, and I was anxious to file the case in the Lonoke County Court, so as to be certain to get service in time to try the case in Lonoke County, and if he made any statement to me about the brakes being out of order, I don't remember it, but when I prepared the complaint and he was sworn to it—I don't think I was present—but afterwards I had a copy, and within less than a week's time, he called my attention to the fact that the brakes were defective and explained about the brakes not clasping the wheels, and then soon after that, in speaking with Mr. Peirce about it, he told me he was going to remove it to this court, and I never filed that amendment, but I had a pencil memorandum of the amendments to be filed, which he gave me soon after the original complaint was filed, but as I found the case was going to be removed, I didn't file that amendment until the case was removed here, as a matter of convenience, and as a matter of saving a little expense, and on the second page, or the third page, where the complaint reads as follows: "and thereby stop the engine; in fact, there were no shoes on the brake of the engine," that was put in there at my own instance and is interlined. I did that at my own instance from the fact that according to his statement, there were no shoes, and I was unable to determine whether there were shoes there. He said if there were any, they were

not clasped, and I alleged, to be on the safe side, that there were no shoes there at all, and I will state, from no statement from Mr. Holloway did I ever know there were no brakes at all on the engine, until I read the answer here. Now, that is the only explanation I wish to make.

Q. These amendments were made after the demurrer was filed, were they?

85 A. Yes sir, these amendments were made after the demurrer was filed, but I told Mr. Peirce at the time he filed the demurrer, or as soon as my attention was called to it, that I intended to file an amended complaint, and that perhaps when I did that, it would obviate the necessity of arguing the demurrer, and the filing of the demurrer had nothing on earth to do with the filing of the amended complaint, because I had that data and that memorandum in my office and intended to do it before I ever came to trial, whether he demurred or not.

86 Will Holloway, plaintiff, being recalled, testified as follows:

Q. Were you in here just while ago when Mr. Barger was testifying? A. No sir, I was out at the time.

Q. Now, I will ask you, in running the engine without brakes, and running it in front of the engine, in coming back from Hulbert, if there was any occasion for stopping the engine in any way for you to notice, or could you have noticed, or did you notice, that there were no brakes on the engine, or that they were out of repair?

A. No, sir, we had no occasion to use any brakes in case of emergency, or anything of the kind. In coming into a station, or making a stop for a water tank, we shut off and rolled in, come in slow.

Q. Shut off what?

A. Shut off the steam and let the engine roll, just by the mere touch of the brake, until you get here to where the spout will come down in the tank. It was a very easy matter to stop her on any ground.

Q. Then there was no occasion in coming from that direction, where you had to stop, to put on the brakes with any force, so as to create any jarring?

A. Yes sir, there was no occasion for that at all; had nothing but just a light engine.

Q. Now, suppose you turned the brakes on that engine, as it was, and the tank is behind you, wouldn't the space between the tank and the engine remain just the same?

A. If there was brakes on the engine?

[A.] No, if there were no brakes on the engine. Suppose you put the brakes on the tank and the engine is going forward?

A. Why, yes sir. Of course, the weight of the engine would drag the tank; the weight of the engine is so much greater than that of the tank, it would drag it along running at anything like its speed.

87 Q. Was there any time that there was occasion to put on the brakes so as to call your attention to the fact that it was dragging and the brakes were not applied to the engine?

A. No sir. We had nothing but a light engine; we could shut off anywhere we wanted to, and stop anywhere we wanted to.

Cross-Examination.

Q. You seemed to make proper stops coming over?

A. Yes sir, we would shut off, if coming into a tank; of course, we could see a tank, and any man that is handling an engine any length of time can always make a calculation to shut off his steam and know just how far it will roll.

Q. In coming over, the use of the engine was such that you could handle it and make proper stops whenever you wanted to?

A. Yes sir, we had no occasion to stop for any emergency stop, or for anything of that kind; just allowed ourselves plenty of time.

Q. How long were you going over?

A. We registered out of Hulbert—I think I have got the orders now—I believe it is 1:01, and we registered into Brinkley something about 7:20.

Redirect Examination.

Q. That was about six hours? A. Yes sir.

Q. How far was it?

A. About sixty miles; about ten miles an hour.

Plaintiff read from the Carlisle Life Tables, showing that the expectancy of a man 33 years of age was 32.36 years.

Here the plaintiff rested.

88 Defendant's Testimony.

Thereupon, the defendant, to sustain its defense, introduced the following testimony:

Dr. J. P. Runyan, a witness for defendant, testified as follows:

Q. What position did you occupy in October last?

A. Division Surgeon of the Choctaw.

Q. Do you know Mr. Will Holloway?

A. Yes sir; that is, I don't know whether I would know him if I would see him now or not. Yes sir, I recognize him.

Q. Did you see him any time about the 30th of October, or a few days after that?

A. Yes sir, I think it was in November some time I saw him.

Q. Whereabouts, and under what circumstances?

A. Well, the claim agent telephoned me to come down and see him. Mr. Kilpatrick telephoned me to go over into Argenta at his home and see him.

Q. Did you go? A. I did.

Q. Just tell the jury what took place between you over there?

A. Well, I went in, and I didn't know anything about the particulars of the case, of course, until I got there. I was just asked to go see the man, very often get these messages, and I responded to the call as quickly as I could, and went over and found Mr. Holloway in his room, lying in bed, and asked him if there was anything I could do for him, and he asked me who I was, and I told him, introduced myself, and he said no, there was nothing I could do for him; that he had a physician, and just remarked that it was a pretty good long while after being hurt for the company to send a man to see him. I asked him if he had sent for me, and he said no, he hadn't sent for me; that the company was supposed to send a man to him. I told him that the company had me employed for that business, but a man when he got hurt, was supposed to let me know.

89 I didn't know when he was hurt.

Q. Did you offer to treat him then?

A. Well, yes sir. I asked him if there was anything I could do for him, and found he had a physician, and of course, I told him if he needed me, he would have to have his physician call me in; that I wouldn't take charge of his case without the other man calling me in to assist him in consultation.

Q. Did he tell you then that it was with you whether you would treat him or not?

A. Of course, I left it with him. The other physician was treating him, and I told him if he needed me, he would have to have his physician call me in; that if he wanted me at any time, he could have me, of course, by having the other physician call me.

Q. I will ask you what provision the Company has made here in Little Rock to take care of its injured employes in the way of physician and hospitals?

A. They at that time had arrangements, and still the same arrangement, with St. Vincent's Infirmary, by which people are taken care of without any expense to themselves, that get hurt on the Choctaw Railroad—employes.

Q. They take them there and take care of them?

A. Yes sir.

Q. They have nurses to look after them?

A. Yes sir.
Q. And do it without any expense to them?
A. Yes sir.

Cross-Examination.

Q. Isn't it a fact that in order to compensate for that service over there, that the wages are taken out of employes of the road at the end of each pay day, a certain amount?
A. That is my understanding.
Q. You don't remember how long it was after the injury occurred, before you were called over there?
90 A. As well as I remember, it was eight days.

Redirect-Examination.

Q. The compensation monthly is taken out, regardless of whether they are injured or not?
A. Yes sir.
Q. If they are not hurt, they have to pay just the same?
A. Yes sir.

Cross-Examination.

Q. You don't know, as a matter of fact, whether the plaintiff here had any knowledge of that arrangement over there at that time until you went there?
A. No more than that it is the general understanding that everybody who works for the Choctaw has a certain stipulated sum taken out of his salary, according to what the salary is, and he knows that that goes on the hospital fund, and that the surgeon and hospital are free to him when he is sick.
Q. There are certain rules and instructions promulgated?
A. They all receive these instructions, yes sir.

91 E. M. Roberts, a witness for defendant, testified as follows:

Q. What position did you occupy on the 30th of last October?
A. Foreman Locomotive & Car Department at Brinkley.
Q. Do you know the plaintiff, Will Holloway?
A. I am not personally acquainted with him, no sir.
Q. You have seen him?
A. Yes sir, I have seen him.
Q. Did you see him on the 30th of last October?
A. Yes sir.
Q. Whereabouts? A. At Brinkley.
Q. Did he come to Brinkley on engine White & Black No. 3? A. Yes sir, him and Mr. Davis.
Q. Are you acquainted with White & Black engine No. 3?
A. Yes sir.

Q. Tell the jury how that engine is equipped with brakes, how many brakes she has got on her, and where the brakes are.

A. She has only tank brakes on her; that is, on both pair of trucks, what we call two pair of trucks under her tank; there is air brakes on both of them pairs of trucks, but there is no brakes at all on her drivers of any kind; never have been since I have had charge of the engine two years last February.

Q. There was none on it then on the 30th of October last?

A. No sir.

Q. Explain to the jury, if there had been any brakes on the drivers of that engine, where the brakes would have been, and about the size of them, &c.?

A. Well, the brake shoes are about 12 or 14 inches long, about six inches wide, and about an inch and a quarter or inch and a half thick, and the brake head is about eight inches wide sets right up in front of the driving wheels, and then there is a brake cylinder that would sit right up under the running board of the cab, with a long lever running out here, and the lever runs down to the brake, so that when you apply the air, it shoves this lever out and applies the
92 brake to the driving wheel. It is very bulky, a man couldn't help but see it if he was to look at it, but this engine had none on.

Q. You say it is perfectly obvious, by looking at an engine, whether the brakes are there or not?

A. I would miss a driver brake on an engine as quick as I would a wheel.

Q. It stands out so it can be plainly and clearly seen?

A. Yes sir.

Q. Could a fireman who had had several years' experience, traveling on an engine from Hulbert to Brinkley, and from Brinkley back, 13 or 14 miles, without knowing whether there was any brakes on the driving wheels or not?

A. I don't see how he could. He must have been a very careless fireman to do anything of that kind, not pay any more attention to his engine than that. He could tell by the feel of the engine, the speed of it, whether there was brakes on it or not.

Q. How many driving wheels did this engine have on it?

A. Six, three on each side.

Q. Then, if there had have been brakes on the driving wheels, there would have been four brakes?

A. Yes sir, there would have been brakes on two of the driving wheels. There would only have been brakes between the two back wheels on that engine the same as an eight wheel engine.

Q. Do you understand engines pretty thoroughly? Are you an engine builder or repairer?

A. I have had about seventeen years experience with the Iron Mountain Railroad as locomotive machinist and foreman before I came to the Cotton Belt Road. I worked with them four years at Jonesboro, and I took charge of the White & Black River shops for W. J. Thompson the 10th day of last February two years ago, and have been there ever since.

Q. When you took charge of that engine, did she have any brakes at all on her? A. No sir.

93 Q. Who put these brakes on the tender?

A. I did.

Q. When was that done? Was it before or after the Choctaw leased the White & Black.

A. The summer before the Choctaw leased the road.

Q. Are you sure about that? Wasn't it after?

A. No sir, it was before. I sent and got an air pump, new, and everything complete and put it on at Brinkley myself.

Q. Now, Mr. Roberts, I will ask you, if that engine was travelling say six or seven miles an hour, under perfect control, and an animal should be discovered on the track, say 50 or 75 feet in front of the engine, whether it could be stopped or not?

A. Yes sir, the air should be plenty strong to stop it in less than that many feet. It ought to stop it in 35 feet or 30 feet—40 at the outside.

Q. Did you have any conversation with Holloway that night at Brinkley, while he was in there?

A. I didn't have any particular conversation with him. He was present when I was talking to Mr. Davis, the engineer.

Q. What conversation did you all have there?

A. Mr. Davis told me if he didn't get out right away, that him and Mr. Holloway were going to go to bed; that they had been out a good many hours—he told me the number of hours, but I forget just what number there was—and that they were tired and sleepy, and that they didn't feel like going back, and especially they considered it unsafe or dangerous to back up through the bottoms at night, the track was full of stock lying down on the track, and I asked Mr. Davis where him and Mr. Holloway would be in case they did go to bed, and they told me they would be at the Arlington Hotel, and I instructed my caller, Mr. Cupp, where to find them and to call them the next morning at four o'clock, give them the eight hours rest, and I went home, supposing they would go to bed.

Q. Where a man has been out as long as they had, did they have a right to demand rest? A. Yes sir.

94 Q. And give it to them, do they?

A. Yes sir.

Cross-Examination.

Q. There was a necessity for the engine going back to Hulbert as soon as it could get down there practically, wasn't there?

A. They were ordered to go back there from Brinkley after they arrived there.

Q. At Hulbert, didn't they have a dirt pit there, from which they were hauling out dirt and putting it on the road?

A. Yes sir.

Q. Isn't it a fact that the engine that they had was reported as being disabled? A. Yes sir.

Q. That was the reason of sending this engine back?

A. Yes sir.

Q. You speak about stopping an engine in 40 feet—running at what speed?

A. Six or seven miles an hour.

Q. Is that when it is all equipped properly with brakes?

A. I can stop it some quicker than that if they had driver brakes.

Q. Going at the rate of 6 or 7 miles an hour?

A. Yes, sir.

Q. What position have you filled in the railroad department? A. I am a machinist.

Q. Have you ever been an engineer A. Yes sir.

Q. Have you ever traveled on the road? A. Yes sir.

Q. Have you ever acted as engineer on the road?

A. Yes sir.

Q. How long?

A. About four months on the Texas & Pacific Road. I got that arm mashed and quit it.

95 Q. Is that the only experience you have had as engineer?

A. No sir, I have run quite a good deal on the White & Black River Branch.

Q. You say if an engine is properly equipped with brakes, you could stop in less than forty feet?

A. Yes sir, a little bit.

Q. Running at the rate of seven miles an hour?

A. Yes sir.

Q. If there are no brakes on the engine, then do you say you could stop within forty feet? A. Yes sir.

Q. Stop within forty feet without brakes on the engine?

A. Yes sir.

Q. No brakes at all, except on the tank?

A. No brakes at all, except on the tank.

Q. Didn't you tell Mr. Davis that they were not going to turn that engine around at Brinkley?

A. No sir, I don't think I did. I don't recollect of ever having any such conversation as that with him.

Q. Were you in charge of the yards at the time?

A. I was in charge of the engine.

Q. Of the engine department at Brinkley?

A. Yes sir.

Q. Didn't you know that the engine was going backwards when it did go? A. Yes sir.

Q. Didn't you know that they were instructed to run it backwards? A. Yes, sir.

Q. Didn't you know that Davis had no right to turn that engine, unless they were instructed to do so from the proper source?

A. Yes sir, if they had no special orders to go back that way, and wanted the engine headed the same way she was going, they had a right to turn her. I would turn it myself.

Q. They did have orders to run it backwards, didn't they?

A. Yes sir, had orders to back up from Brinkley.

96 Q. Would you have had the right to have changed that order without some authority from headquarters?

A. No sir.

Q. Then if they were ordered to back up to Brinkley, you would have had no right to turn it there? A. No sir.

Redirect Examination

Q. I will ask you why it was they had to back that engine up?

A. In order for her to be headed right to work in the pit.

Q. Explain to the jury so they will understand it?

A. Well, the engine wanted to work the cars ahead of them, so the engineer could see right ahead of him when he was working loading or handling these gravel cars.

Q. That is, they wanted the engine headed the way she was then when it got back to Hulbert? A. Yes sir.

Q. Now, when it got back to Hulbert, if they had turned the engine it would have been facing east? A. Yes sir.

Q. Now, what means, if any, did they have at Hulbert for turning the engine?

A. They didn't have any, I don't think.

Q. Then in order to turn the engine and use it as they wanted it at Hulbert, what would they have had to have done?

A. They would have had to go to Hopefield.

Q. How far beyond was that?

A. I don't know exactly how far. I never paid any attention to the time card, how far it was.

Q. They would have to run on to Hopefield and turn the engine, and then run back to Hulbert in order to get there with the engine headed the proper way they wanted to use it to work? A. Yes sir.

97 C. H. Welch, a witness for defendant, testified as follows:

Q. What were you doing on the 30th of October last?
A. I was master mechanic of the Choctaw at Argenta.
Q. Do you know the plaintiff, Will Holloway?
A. Yes sir.
Q. Do you remember the time that he was on an engine going backwards from Brinkley east, and the engine was derailed about 15 miles east of Brinkley? A. Yes sir.
Q. Were you over there? A. Yes sir.
Q. Did you see Holloway at that time? A. Yes sir.
Q. How long was it after the wreck that you saw him?
A. Well, I am unable to state the exact time. It was the same morning though, when they had picked the engine up and pulled it into Palestine.
Q. How did you go over there?
A. I went over with the wrecking outfit.
Q. Did you see Holloway when you got over there?
A. Yes sir.
Q. What was he doing?
A. When I got to the engine, he was up in the cab. He got out of the cab and stepped down on the ground where I was.
Q. What evidence of injury did he have, or make any complaint of? What seemed to be the extent and nature of his injury.
A. Well, he said that he had strained his back when he got off was all he said to me.
Q. How long did you stay there?
A. I was there until No. 1 came along. I don't remember just the exact time. It must have been somewhere about twelve o'clock.
Q. Did you come back with Holloway?
A. In the same train with him, yes sir.

98 Q. Did you notice him making any complaint about any serious injuries? Did he seem to be specially hurt?
A. No sir.
Q. What complaints did he make, if any?
A. He didn't make any complaint, only just the remark he made when I first got there. I ask him if he had been injured, and he said that he hurt his back in getting off—strained his back getting off.

Q. Were you acquainted with that engine that Holloway was on? A. Yes sir.

Q. Was there any part of the brakes on that engine?

A. No sir.

Q. Was there any of the equipment that goes with it?

A. No sir, not on the engine.

Q. Now, Mr. Welch, if a man has had several years experience as a fireman and knows something about building tenders or tanks, I will ask you if it is possible for a man to ride on an engine from Hulbert to Brinkley and from Brinkley back 15 or 20 miles, over the track without knowing whether there were brakes on the engine? A. No sir.

Q. Explain to the jury why?

A. Well, the brake is something that is in plain sight of the engineer. It is not hidden in any way if it is there.

Q. Is it in sight of the fireman?

A. In sight of the fireman as well. If he looks at the engine at all, he can't help but see it.

Q. Is it as patent as the wheel of the engine?

A. Just as patent as the wheel is, yes sir.

Q. If he was riding on an engine, and there is no brake on the driving wheel of the engine, what evidence would there be then that there was no brakes on the driving wheels? How would a fireman know that there were no brakes on the driving wheels of the engine by riding along, from the

99 motion of the engine, if any?

A There is nothing about the riding of the engine would tend to show him that part of it.

Q. Suppose he stopped the train, and the air is applied to brakes on the tender, but there are none on the engine, would there be anything then?

A. There would be just a slight difference in the distance they would stop in.

Q. Would there be any bump or running along in front?

A. No sir, I don't think there would be any difference about that part of it.

Q. Then the only reason why he should see them is they are just in plain sight?

A. Yes sir, that is all.

Q. Now, Mr. Welch, suppose that engine, equipped as it was, with brakes on the tender, and under perfect control, running five or six or seven miles an hour, and an object was seen, could it be stopped in time to prevent running over the object?

A. Well, an engine that is not moving more than six or seven miles an hour, with a good tank brake, ought to stop in 45 to 50 feet, if they are not making more speed than that.

Cross-Examination.

Q. You say, without any brakes on the engine at all, it ought to stop in 45 or 50 feet?

A. Yes sir, good tender brakes.

Q. If the tender was running in front, and the brakes were suddenly turned on the tender, wouldn't the momentum of the engine without brakes be pushed up against that at once?

A. Not to do it any injury, no sir.

Q. The engine is a great deal heavier than the tank, isn't it? A. Well, yes sir, that engine was a little heavier.

Q. Now you say a man could see this brake if he had looked at it, suppose the fireman was riding in the engine all the time, he couldn't see it from where he was acting as fireman, could he?

100 A. You can see, yes sir; you can see part of the appliances from the cab of the engine.

Q. You can by looking for it? A. Yes sir.

Q. When you say it is obvious, where a man goes down and looks around to see whether the brake is there, he would see it? A. Yes sir, it is in plain sight.

Q. The main frame of the brakes are under the engine, isn't it?

A. The shoes are right on the face of the driving wheel.

Q. But the balance of the brake is right under the engine, isn't it?

A. No sir the rods and the levers are, but the cylinder and fulcrum are outside the frame, if there is a driving brake on the engine.

Q. What you call the shoe comes right over the wheel?

A. Comes on the face of the driving wheel.

101 J. T. Wells, a witness for defendant, testified as follows:

Q. What were you doing on the 30th of last October?

A. I was train dispatcher for the C., O. & G. R. R.

Q. Do you remember the night that an engine went off the track over east of Brinkley?

A. Yes sir.

Q. With engineer Davis and Fireman Holloway?

A. Yes sir.

Q. Who was directing the movements of the engine that night? A. Well, I was dispatcher on duty.

Q. You had charge of the trains then, did you?

A. Yes sir.

Q. I will just get you to tell the jury what orders you gave, how come you to give them, &c., that night with respect to the running of this engine from Brinkley to Hulbert?

A. The engine left Hulbert at 1:05 p. m. We had started it into Little Rock for repairs, and on the way from Hulbert to Brinkley, there was another engine broke down at Hulbert which was in worse fix than this one, and we stopped this engine at Brinkley, and waited until we heard from the other engine to see which could be repaired first, and it was decided to run this engine 3 back to Hulbert to take the place of the other one, as it was in better shape than the one at Hulbert, and they had to do some work on this engine 3 before it could go back, had some brasses to put in; that and one thing and another. It got there about seven o'clock in the evening, and it was nine or ten o'clock before it was ready to go back, and there was another train, a freight train there at the time, going east, about the time that engine was ready to go, and they were complaining about wanting rest, and we had no other crew there that I knew of to take the engine in case they called for rest, and I tried to get them out of there as soon as we could.

Q. You say they were complaining for rest?

102 A. Well, I understood that the fireman had said that if they didn't get out of there right away, he intended—

Q. Just testify what took place with reference to turning the engine?

A. Well, there was considerable correspondence between myself and the operator at Brinkley with regard to the engine getting out of there, and how it should go, and the delay that was going on, and he said something about turning the engine, about the engine being headed west, and I don't remember whether he wanted to ask for an order to have it turned or not, but I don't think he did.

Q. (By the Court): What were your instructions?

A. Why, I told him to let them go which ever way they wanted to go. I told them if they wanted to back up all right, and if they didn't all right. I didn't give him any positive instructions either way until they decided to go, and then I gave them their orders

Q. (Counsel for Defendant): After they decided which way they would go? A. They decided to go.

Cross-Examination.

Q. Have you got a copy of that telegram that you sent?

A. I have got a copy of the order.

Q. Will you read that please?

A. "No. 83. C. & E. 1st and 2nd No. 9, Edmonson; C. & E. W. & B. Eng. 3, Brinkley. W. & B. Eng. 3 will run special from Brinkley to Hulbert, and has right of track to Summit against 1st and 2nd No. 9, Engines 31 and 17, and will back up carefully." Davis signed the order at 10:12.

Q. That is the order you gave them?
A. Yes sir, that was the last that I had to do with the engine.
Q. That was the last order that you gave them?
A. Yes sir.
Q. What order did you give them prior to that time?
A. I didn't give them any on this trip, as they were starting out.

Q. How did they have any information that they
103 should go back, unless an order from you?

A. They had decided to go back in the way I understood it.
Q. Decided to go back without any orders from this end of the line?
A. No sir, that was the order they got after they had decided to go and was ready.
Q. What information did they have, however, to go back before you sent them that order?
A. Oh, they had an order there. I think Mr. Roberts was instructed to send them back to Hulbert. He was the foreman in charge of the round house.
Q. You were the dispatcher here? A. Yes sir.
Q. All you know about it other than what appears there (on dispatcher's order book) is your information you got from the other end of the line?
A. Yes sir, from the operator at Brinkley.
Q. You know nothing about it from your own personal knowledge? A. No sir, I was not on the ground.
Q. Did you keep any copy of any other telegram?
A. There was no other telegram sent. It was all conversation.
Q. Well, it was conversation over the line?
A. Yes sir.
Q. Was there anything else reduced to writing?
A. No sir this is the only writing that we have of it.
Q. This is the only writing that you have at this end of the line? A. Yes sir.
Q. What was the name of the operator at the other end of the line? A. His name is Bolinger.
Q. Where is he? A. He is in Oklahoma, I think.
Q. When did you see him last?
A. I haven't seen him for about a week.

Q. Wasn't he here after this case was set for trial?
104 A. Yes sir.

Q. Where is he now?
A. He is out in Oklahoma, I think. He got a pass to go there.

Q. He got a pass from you?
A. From the superintendent here.
Q. Superintendent of the Choctaw Railroad?
A. Yes sir.
Q. To go to Oklahoma? A. Yes sir.
Q. About a week ago? A. About that.

Redirect Examination.

Q. You say that Holloway was kicking for rest?
A. That is what the operator told me.
Q. I will ask you if the fireman would have had a right to demand rest?
A. Yes sir, any man has a right to demand rest.
Q. After he had been out as long as Holloway?
A. Yes sir.
Q. If he had have demanded it, would you have given it to him?
A. Yes sir, we have to. We are instructed to give men rest if they demand it, when they have been on the road.

105 Defendant thereupon read to the jury the deposition of W. H. Davis, taken by the plaintiff, at Denison, Texas, as follows:
Q. What is your name, age and occupation?
A. W. H. Davis; age 28 years; occupation, at present, that of brakeman on the M. K. & T. Ry. Co.
Q What was your occupation in Oct., 1900?
A. Engineer on the Choctaw, Oklahoma & Gulf R. R. Co.
Q. How long have you been an engineer?
A. I was first made an engineer about eight years ago.
Q. How long had you been an engineer on the Choctaw? when you left their employ? A. About eight months.
Q. Were you engineer on Engine No. 3 W. & B., on or about Oct. 30th, 1900? A. Yes.
Q. Where did you receive that engine?
A. At Hulbert.
Q. From whom did you receive that engine?
A. I think it was from Engineer Waters, of Hulbert, Ark., where he temporarily lived.
Q. How far did you run, from what point and to what point? A. From Hulbert to Brinkley, about 60 miles.
Q. About what time did you reach Brinkley on the night of Oct. 30th, 1900? A. About seven o'clock p. m.
Q. Did you have any telegraphic orders to take your engine from Hulbert to Brinkley? A. Yes.
Q. Have you those orders now, or a copy of them?
A. No.

Q. State in substance the order, if you have not the original or a copy thereof?

A. About as follows: "Engine W. & B. 3 run as first thirteen from Hulbert to Brinkley."

106 Q. Did you receive any order to bring it on to Little Rock? A. No.

Q. What time did you reach Brinkley on the night of Oct. 30th, 1900? A. About 7:00 p. m.

Q. What further orders did you receive there in regard to the movement of your engine?

A. To take the engine back to Hulbert.

Q. From whom did you receive these instructions to take the engine back, and when?

A. From the Chief Dispatcher, the same night about 10:00 o'clock p. m.

Q. These orders were telegraphed to you at Brinkley?

A. Yes.

Q. Have you the original of that order?

A. No but I have just stated the substance of it.

Q. Was there any request made by you or your fireman to the train dispatcher for permission to reverse the engine?

A. I do not remember of any such request being made by myself or by my fireman.

Q. In what manner did you start your engine from Brinkley to go back to Hulbert?

A. I started the engine east, backing up.

Q. How far did you proceed in that manner?

A. Between 12 and 15 miles.

Q. Then what happened? A. I run over a horse.

Q. At what rate of speed was you going when you ran over the horse? A. About seven miles an hour.

Q. Were you keeping a lookout when you ran over the horse? A. Yes.

Q. If you were keeping a lookout, how far ahead was the horse when it was first discovered?

107 A. I did not see the horse until we had ran over it, and had stopped.

Q. Did you apply your brakes at all?

A. I did not until after I had ran over the horse.

Q. Did you stay on your engine?

A. I stayed on my engine until it had very nearly stopped. It ran half its length after I got off of it.

Q. Did you apply brakes to check speed of train, or to stop it? A. I applied the brakes to stop.

Q. What brake did you apply?

A. Automatic air brake.

Q. Is the road fenced at the point along where the accident occurred? A. Yes, I think it was.

Q. Who was your fireman on that run?
A. Will Holloway.
Q. How and where did the horse get on the track?
A. I do not know anything about that, except that it got on the track about five feet from the trestle.
Q. The engine was derailed by running over the horse, was it not?
A. Yes, I think that was what the cause of it was.
Q. Were there any gaps in the fence along there?
A. None that I knew of.
Q. You suppose the fence to be in good condition there?
A. Yes.

Cross-Examination.

Q. Had Holloway made the trip with you that day from Hulbert to Brinkley? A. Yes.
Q. Are you positive that the track was fenced, at the point where the accident occurred?
A. I had passed there many times before and do not remember of seeing any place along there that was not fenced.
Q. For what distance was the track fenced?
A. I do not remember, and do not know exactly.
Q. Can you tell about how far?
A. From near Goodwin to Forrest City, a distance of about twenty-two miles.
Q. The fact that the engine was going to back up from Brinkley to Hulbert was as well known to Holloway as any one else, was it not? A. Yes.
Q. What prevented you from seeing the horse before you struck it?
A. The horse was of a dark color and it was a dark night, and the horse did not come up on the track on my side, according to the tracks found on the dump where it came on the railroad track.
108 Q. When you applied the brakes, did they act promptly and make the proper stop of the engine?
A. Yes, it made a good stop.

Re-Direct-Examination.

Q. You say that the fact that the engine was going to back up from Brinkley to Hulbert was as well known to Holloway as any one else, please say what you mean by that?
A. I mean that I read the orders to him and showed him the orders.
Q. It was your duty to show him the orders? A. Yes.
Q. You speak of examining the tracks of the horse in your cross-examination, how far did you examine the tracks?
A. About five or six feet from the trestle.

Q. You just stopped then examining the tracks?

A. Because that was as far as I could see the tracks.

Q. What color was that horse?

A. A dark color, it might have been a black and it might have been a brown.

Q. Mr. Davis, please state if you did not have a conversation with J. W. House, and was not Will Holloway present, at your boarding house in Argenta, Ark., and afterwards another conversation at the office of J. W. House, 2nd & La. St., in the City of Little Rock, Ark., and in these conversations, or either of them, did you not say, that you were keeping a constant lookout and that when you first saw what afterwards proved to be a horse on the track, that you thought at first it was a shadow, and afterwards when you saw that it was a horse, or impediment of some kind, or some obstruction on the road, that such obstacles was 30 to 50 feet in front of tank; that you immediately applied the brakes, but could not stop the engine until it struck the horse?

A. Will Holloway was never present at any conversation between Mr. House and I. So far as me making any statement to Mr. House in regard to seeing anything on the track from 30 to 50 feet in front of tank, I did not make any such statement.

109 Q. What did you state to Mr. House in these conversations, or either of them?

A. I only remember of having one conversation with Mr. House, and that was at my boarding house in Argenta, with Mr. House alone, and all the conversation I remember of having with Mr. House was saying to him that Holloway was firing for me and that we run over the horse, and Mr. House asked me if I had the orders that I received that night. I told him I did at that present time, and further, I did state to him that [—] was keeping a constant lookout.

Q. Did you receive a letter from Mr. House, asking permission to take your deposition, said letter being dated April 8th, 1901, and addressed to you at Muscogee, I. T.?

A. Certainly, I received the letter.

Q. Did not that letter reach you at Denison, Texas?

A. It did.

Q. Did you not answer that letter?

A. As well as I remember, I did.

Q. Is this your letter in reply to that? A. Yes.

Q. If so please mark it for identification and have it attached to these answers as Exhibit A. A. All right.

Q. Did you not receive a second letter from J. W. House dated April 16, 1901, addressed to you at Denison, Tex.?

A. Yes, about that date.

Q. Is this the letter you wrote in reply to that letter?

A. Yes.

Q. If so, please mark for identification and have it attached to these answers as Exhibit B? A. All right.

Q. Did you not receive a third letter from J. W. House, directed to you at Denison, dated April the 22nd, 1901?

A. Yes, about that date.

Q. Is this letter you wrote in reply to that letter? A. [—]

Q. If so, please mark it for identification and have it attached to these answers marked exhibit C?

110 A. All right.

Q. Did you not receive a fourth letter from J. W. House, dated April 25th, 1901, addressed to you at Denison?

A. I think I did about that date.

Q. Did you answer that letter? A. I did not.

Q. Have you the first of these letters, the one addressed to you at Muscogee? A. I have not.

Q. Where is it? A. I could not say where it is.

Q. Did you not, after receiving the first letter from J. W. House send it to the defendant company, and did not you ask for a job there again?

A. I did not send it to the company.

Q. To whom did you send that letter, and where to?

A. To Mr. S. H. Barnes, at Little Rock, Ark.

Q. Is he an employee of the defendant Company?

A. He was when I left there.

Q. What was his position? A. Train Master.

Q. Does he hold that position yet? A. I do not know.

Q. Did you think he held it when you sent him the letter?

A. I did.

Q. Did you ask through him for a job with the defendant company?

A. I do not exactly remember whether I did or did not.

Q. Why did you send Mr. Barnes Mr. House's first letter?

A. I consider that that is my business; that ought to be enough.

Q. Then you refuse to answer the question? A. Yes.

Q. Do you pretend to say Mr. Davis that you don't remember whether you asked Mr. Barnes, or through him, for a job with the defendant Company when you sent Mr. House's letter to Mr. Barnes?

111 A. I do not remember whether I did ro did not.

Q. Have you asked for a job with the defendant Company since sending Mr. House's letter to Mr. Barnes?

A. Nothing more I believe, than to ask to be re-employed.

Q. How, when and from whom did you ask to be employed?

A. I wrote to Mr. Harris, the General Superintendent, at Little Rock, about the 10th or 15th of April, 1901.

Q. Did you write or ask any one else for a job with the defendant Company? A. Not as I remember of.

Q. If you had written such a request to anyone else, would you not have remembered it?

A. I do not know if I would or if I would not have remembered it.

Q. How is it that you remember so well about the letter you wrote to Mr. Harris and do not remember whether you wrote any other letter or not?

A. This was the first letter I wrote.

Q. What did you do with Mr. House's second letter as above mentioned?

A. I think I have it on my person.

Q. What with the third, and with the fourth?

A. They also are on my person.

Recross-Examination.

Q. Has the Choctaw Ry. Co., or anybody for them, either directly or indirectly made you any promise of re-employment?

A. They have not.

Q. Did you ever receive an answer to your application to Mr. Harris? A. No.

Q. Please state about how long before you left Brinkley on the night in question you showed Holloway your orders?

A. About the time we were leaving Brinkley.

112 Redirect Examination.

Q. How long before you left Brinkley did you receive those orders?

A. About 35 minutes as well as I remember.

Exhibits A, B and C to this deposition, were not read with the deposition, but were read by Mr. J. W. House in his testimony, and for that reason are not copied here.

For Exhibit "A," see folio 127 this record.
For Exhibit "B," see folio 128 this record.
For Exhibit "C," see folio 128 this record.

113 E. B. Peirce, Attorney for Defendant, testified as follows:

I just want to say, in regard to Mr. Bolinger, that up to about six or seven days ago, he was here in Little Rock; that is, he was in the employ of the Company, as I understand, and I made a requisition as the attorney for the road, for Mr. Bolinger. He came to my office and I had a talk with him and directed that he should be here to-day as a witness, and he stated then that he was going to go out somewhere west on the line, and would still be in the employ of the company, and I directed him then to go to the superintendent's office and

make arrangements there with the superintendent, before he left, for his attendance here to-day, and he promised to do so. It is not our custom, and we never have any witnesses on the railroad subpoenaed. The witnesses working for the Company come without any subpoena, and about two or three days ago, as is my usual custom, I begun to ascertain if all my witnesses understood the arrangement and day for trial, so that there could be no misapprehension, and I sent to the superintendent's office to know where Mr. Bolinger was, and to give them instructions again to send Mr Bolinger, and they stated to me that Mr. Bolinger had gone out west with the understanding that he would be back here to-day, and he had been properly provided with transportation and instructions. Now, why he is not here, I am unable to say, but I do say that it is not with the connivance, consent or permission of the defendant Railroad Company, because we intended and expected that he should be here to-day, and made all arrangements to that effect.

114 Y. E. Whitmore, a witness for Defendant, testified as follows:

Q. What are you doing?

A. I am a machinist in the employ of the Iron Mountain & Southern at Baring Cross shops.

Q. Where were you engaged on the 30th of last October?

A. I was employed as an engineer on the Choctaw, Oklahoma & Gulf.

Q. You are not now employed there? A. No sir.

Q. You are not in the employ of the Choctaw Road?

A. No sir.

Q. Mr. Whitmore, do you remember the night of October 30th, when the engine at trestle 547 was derailed? A. I do.

Q. When Fireman Holloway was on? A. Yes sir.

Q. Did you see Mr. Holloway that night? A. I did.

Q. Where did you see him?

A. I saw him at Brinkley before he left, and I saw him at the trestle after the accident.

Q. When you got down there, where did you first see him?

A. He flagged me about six or eight telegraph poles this side of the wreck and got on the engine.

Q. Was the engine moving or standing still at the time he got on? A. Moving about six or eight miles an hour.

Q. Did he tell you how he got his injury?

A. Why, he spoke of no injury at that time, said he was bruised up a little bit from getting off.

Q. Mr. Whitemore, are you acquainted with the White & Black Engine No. 3 that went off that night?

A. Well, yes sir, I looked at the engine after the accident, and I had seen her frequently before that.

115 Q. Do you know whether or not she had any brakes on the driving wheels?

A. No sir, I don't believe she had. I am positive she had not.

Q. Now, Mr. Whitmore, I will ask you if a fireman with several years' experience could travel from Hulbert to Brinkley, and part of the way back, without knowing whether an engine had brakes on the driving wheels?

A. No sir, it is hardly probable that he could; I don't think he could. In fact, the brakes on the locomotive is a very important thing, and anybody that has had five years experience as a fireman, or in the train service at all, would know whether there was driving brakes on the engine or not, as they are in a very conspicuous place.

Q. Do you think a fireman could, with any considerable experience, or any experience, ride from Hulbert to Brinkley, and part of the way back, and not know whether there were any brakes on the driving wheels?

A. No sir, I don't think he could.

Q. You say you saw them at Brinkley before they started?

A. Yes sir.

Q. Were they moving the engine around there any?

A. Yes sir.

Q. What movements did they make of it? I will just ask you this: Do you know whether Holloway was on the engine moving it or not?

A. He was on the engine, but the engineer was moving the engine.

Q. Moving around in the yards?

A. Yes sir, moving backwards and forward to get out of my way while I was doing some switching there.

Cross-Examination.

Q. You have stated that a fireman wouldn't probably ride on the engine that distance—now, a fireman's duty is to make the fire isn't it, and look after the fire?

A. Yes sir, his duty is to look after the fire, and as-

116 sist the engineer with his duties as much as possible. He takes and accepts the position as a fireman always with the prospects of going further. He accepts the position as a fireman to advance his position in life, and every fireman that you see—the engineer is foreman of the engine, he is the boss, you may say, he is recognized as the head, and the fireman is subject to the engineer's orders, and no fireman could

possibly be on an engine, with five years' experience, that wouldn't know whether there was a driving brake on the engine or not, at this day and time.

Q. He could see them distinctly, could he?

A. Yes sir, very distinctly.

Q. Suppose he was riding in the engine, could he see them then?

A. Yes sir, you can see them if you lean your head out of the cab window six inches, you could see the brakes. More than that, they have a triple valve right underneath the fireman, attached to what is called an auxiliary reservoir, and each time the brake is applied and let off, the air escapes from this triple valve and makes a whistling noise, and in the absence of brakes, that noise is not there.

Q. The absence of brakes anywhere?

A. No sir, there is a triple valve on both engine and tank, where there are brakes.

Here the defendant rested.

117 Plaintiff's Rebuttal.

Thereupon, the plaintiff, in rebuttal, introduced the following testimony:

W. F. Barger, being recalled, testified as follows:

Q. How long have you been braking on the railroad?

A. About seven years.

Q. Were you a head brakeman?

A. I have worked both on the head end and hind end.

Q. When you work as a head brakeman, where is your post of duty?

A. Going through stations, you are supposed to be out on top of the cars.

Q. How far from the engine? A. On the head car.

Q. Now, I will ask you if you ever noticed, when the brakes were turned on, if you could state about how far an engine and a tank would run after the brakes were turned on, where they were properly equipped with brakes?

(By the Court): Do you know it?

A. Why, if you are not going very fast.

Q. (By the Court): That is not the question? Do you know at all? A. Yes sir, I do.

Q. (Counsel for Plaintiff): You know the W. & B. engine No. 3, and the tank? A. Yes sir.

Q. Suppose that was going at the rate of about seven miles, not to exceed seven or eight miles an hour, with no cars behind it, nothing but the engine and the tank, how far would that run on level ground, going seven or eight miles an hour,

and where there was just the engine and the tank, and where both the engine and the tank were properly equipped with brakes, how far would that run before it would stop, after turning on the air brakes?

A. Why, about ninety feet, something like that, two rail lengths.

118 Q. If there were no brakes on the engine, take this engine, the same condition I have already stated, if there were no brakes on the engine, about how far would it go then before it could be stopped, with brakes on the tank and none on the engine?

A. Why, it would go further, of course; it would go about 100 or probably 125 feet.

Cross-Examination.

Q. Have you ever been an engineer?

A. No sir, I never have.

Q. You have had no practical experience along that line?

A. No sir.

Q. Would you pretend to tell this jury that a light engine, with no load to it, on a level track, and under perfect control, with brakes perfectly equipped on the tank, couldn't stop in 45 or 50 feet? Would you pretend to tell this jury that?

A. I have always seen it.

Q. Just answer the question. Would you pretend to tell this jury that an engine properly equipped with brakes on the tender, light engine, under perfect control, could not be stopped in 45 or 50 feet?

A. As far as my knowledge, I don't think it could. Of course, I might be mistaken.

Q. Do you have enough knowledge to speak definitely about it one way or the other? Do you say it could not be done? A. I do not think it could be done, no sir.

119 ..... Farrell, a witness for plaintiff, testified as follows:

Q. What business are you engaged in? A. Fireman.

Q. For the Choctaw & Memphis?

A. Choctaw, Oklahoma & Gulf, yes sir.

Q. How long have you been fireman?

A. Something like ten or eleven months.

Q. Do you have occasion to observe the effect of turning on the brakes—air brakes—on a train, and what length of time it can ordinarily be stopped? Has your attention ever been called to that as a fireman? A. Yes sir.

Q. I will ask you if you can state from your experience and observation how far an engine and a tank—you know this engine No. 3, W. & B., do you? A. Yes sir.

Q. Take an engine like that, and the same tank, on a level road, where both the engine and the tank are properly equipped with air brakes, how far would they run after the air brake was applied to the engine and to the tank, ordinarily, on a level road?

A. Well, it is owing to how fast the engine was running at the time.

Q. Say running at a speed of seven or eight miles an hour?

A. Well, it ought to stop within 60 or 75 feet.

Q. Suppose there are no brakes on the engine, but brakes on the tank, how far would it go?

A. I think it would run 40 or 50 feet further, something like that.

Cross-Examination.

Q. What you have stated is not from any actual experience, is it, in running an engine? A. No sir, I never ran an engine.

120 Q. Do you pretend to tell the jury that with a light engine like the W. & B. No. 3, with the air brakes in perfect condition on the tender, and the engine under perfect control, that it could not be stopped in 45 or 50 feet?

A. Yes sir. I have been on light engines is the reason why.

Q. I ask you if you undertake to tell the jury positively if it could not be done? Can it, or can it not?

A. I stated while ago, I didn't think it would stop within less than 60 or 75 feet.

Q. You have never had any experience as an engineer, have you? A No sir, I never ran an engine.

Q. (By the Court): If you was a fireman, you would have occasion to watch it? A. Yes sir.

Q. How long does it take it to stop if it was running at the rate of six or seven miles an hour, regular train with [a] loaded cars?

A. Well, that would be owing to how many cars you had, how many loads.

Q. Well, compared to the length of the train?

A. Well, it would run something like that length, a couple of telegraph poles, something like that.

Q. Suppose there were two cars attached, how long would it take?

A. You would stop in less distance, certainly, because there would be less force.

Q. Less than half the length of the train or more?

A. Oh, if there were only two trains, you would undoubtedly run further than two car lengths before you could stop.

Q. It would run two car lengths? A. I think it would.

121 Will Holloway, Plaintiff testified as follows:

Q. You were on the witness stand yesterday, and something was said about being able to see the brakes on an engine by standing in the cab where it was your place to stand, and looking out in front, now state to the jury if that is true, and if not true, state why it is not true?

A. No sir, you cannot see that at all from standing on the inside of the cab, by sitting in there on the seat. As I told you, the cab comes up here; just by the side of you is a window. There is a window direct in front of you, I suppose you may say it was 3½ feet to the front. There is a board something like this. It is supposed to be anywhere from 28 to 32 inches wide; that comes right along by the side of the boiler. Your seat is right up on top of this.

Q. Your seat is in top of the board in the cab?

A. Yes sir, the cab is built on this board that runs right straight with the boiler. The board runs continuously to the far end of the boiler. The back driver sets right under here, directly under the fireman's seat, a short distance ahead of that is the second driver, and between these two drivers are the brakes, and you cannot possibly sit here and look out there and see the brake by any means?

Q. Can you stand there and see the brakes?

A. No sir, you have got to lean out of the window and look over to see the brakes?

Q. Did you make an examination yesterday in reference to this matter? I will ask you if you examined an engine that was constructed like the one you were on?

A. Yes sir, it was a Roger engine?

Q. Was the engine that you were on constructed similar to the engines that you examined yesterday evening?

A. Yes sir.

Q. You examined these in my presence? A. Yes sir.

Q. I will ask you—that board that you speak of that
122 runs out—that is your board that is on the inside of the cab, and it projects out beyond the window, like you are looking out of the window here, this board projects out here how many inches? A. 21½.

Q. How wide is this board? A. 25 inches.

Q. Where is this brake situated in reference to this board?

A. The first wheel would be sitting here right direct under the fireman's seat. He rides over the back driver. The next driver is just enough ahead to allow two brakes between the two.

Q. Now, I understand you that this board obstructs the view so that you couldn't stand and see it? A. No sir.

Q. The brake, as I understand you, is immediately under the end of this board? A. Yes sir.

Q. Did you say how far out you would have to look out to one side in order to see that brake?

A. Looking out of the side window, you have to balance yourself. It is about twenty inches that you have got to straighten out, before you can get over to see these brakes.

Q. Kind of a strain before you can see these brakes at all?

A. Yes sir, you would have to balance yourself on the window sill.

Q. Now, I understand you that in looking out of the front window, where it is the duty of the brakeman or the engineer to stand, that you cannot see the brake, by reason of this board that goes out in front?

A. No sir, you cannot see it by sitting down on my seat, the place where the fireman sits.

Q. Can you see it and stand up?

A. You can if you step to the window and look over. You understand these two back boards are double; they pass clear outside the cab; they pass from 18 to 20 inches; the eight
123 wheel engines are a little different from the ten wheelers; that board comes back, and it is under the edge of that board; you cannot observe the brake.

Q. You heard Mr. Roberts' statement here on the witness stand about the conversation he had with Davis, in which he said that you were present? Were you present at any conversation he had with him about authorizing you to go to sleep and they would wake you up at four o'clock in the morning?

A. I never was in Mr. Robert's company one minute in my life.

Q. Was any such conversation as that had?

A. None that I ever knew of.

Q. Mr. Whitmore, the gentleman who went down there? You stated yesterday that you didn't get on your engine until it stopped? A. Standing perfectly still.

Q. Did you make any statement to him that you got hurt in falling from the train or from the car?

A. No sir, I made no statement to Mr. Whitmore whatever in regard to this matter.

Q. Have you ever made any statement other than the ones you have made here in your statement before the jury as to this injury?

A. Yes sir, I made that personal injury statement.

Q. Have you ever made any statement different from that that you are aware of?

A. No sir, I made no statement different from that, the one that went to the officials.

Q. I see in Davis' deposition, he says that you were keeping a lookout, and he didn't see the horse until he had run over it and had stopped. I will ask you if you had a conversation in my office, or if Davis and myself, when you were

present, all three of us present in my office, on one or more occasions, had a conversation in reference to how this accident occurred?

A. Yes sir, we came to your office together. He come to see you on the same business, in regard to his case, and you was talking concerning this matter, all about it, and he said to you that when he first noticed the object on the track, it was somewhere from 40 to 60 feet ahead; on first observing this object, he thought it was merely a shadow, but at
124 an instant, he realized that it was an object of some kind, or obstruction, and applied his air, and at the same time he applied his air, he hallooed to me to give me an opportunity to get out.

Q. Mr. Davis said something about the tracks of the horse. Did you have occasion to observe the tracks back from where you struck the horse?

A. After I had left my engine, going back to flag Mr. Whitmore, who was following us, I had a red light in my right hand, and a large torch that was used on engines in my left, and on going up the track of the railroad, the tracks of the horse were very plain where he was running in the center of the track, going on ahead of us, as far up as I had gone, something like 100 yards.

Q. How many conversations did you have with Davis? Was Davis in my office when you were present and we talked this matter over?

A. We had two conversations in your office and you were present at both.

Q. Do you recollect what he said to me in regard to the telegram that you received and the telegrahpic orders?

A. You asked him for the order, and he admitted, I believe, having the order and said that he would show it up at the proper time, is about the words, I recollect.

Q. Do you recollect what he told me about the substance of the orders that he had to back his train to Hulbert?

A. Yes sir, he said he had orders to back it there.

Q. You say you tracked the horse how far?

A. As far as I had gone, something about 100 yards. I suppose it might have been a little more, or a little less.

Q. Were they on the railroad track?

A. Yes sir, they were on the railroad track. I was walking up the middle of the track.

Q. You were going back to flag the train?

A. Yes sir, I was going back to flag Whitmore.

125 Cross-Examination.

Q. Do you know when these tracks were made there?

A. From the way they looked, they seemed to be very fresh, and looked like they were made by a horse running.

Q. Did you stop to inspect the tracks?

A. Yes sir, I watched them very carefully, because we killed the horse.

Q. Now, that running board that you speak of stands above the driving wheels, doesn't it? A. Yes sir.

Q. Runs very near the top of the boiler?

A. No sir, not near the top, only the center of the boiler.

Q. The driving wheels are under that? A. Yes sir.

Q. If you lean your head out of the cab, you can see the driving wheels?

A. You can if you lean out far enough.

Q. Can you see something of the driving wheels sitting in your seat in the cab?

A. You may see the front ones. You may see the third wheel, but I don't think you can see any more than the far edge of the rim of the middle wheel. I never tested that at all. I don't know exactly.

Q. You just sit up there and didn't look to see?

A. I had no occasion to. I am no engine inspector or engineer. I am a locomotive fireman, and I fill that.

Redirect Examination.

Q. How is the track over here as to being level or hilly from Brinkley to Hulbert?

A. The track is comparatively level through the bottom country. The road is throwed up and made.

Cross-Examination.

Q. How much switching did you all do in the yard at Brinkley that night?

126 A. We headed in on the passing track next to the main line, and then we headed in on the house track in order to let Mr. Whitmore pass and cut his train in two below us.

Q. You were getting out of the way of his train?

A. I wasn't doing any switching at all myself.

Q. You were on the engine? A. No sir.

Q. Where were you?

A. I was throwing the switch. I was acting in the capacity of two men, fireman and brakeman.

127 Mr. Jos. W. House, Attorney for Plaintiff, testified as follows:

I desire to read the correspondence between W. H. Davis and myself.

"W. H. Davis, Esq.,
C-o M. K. & T. R. R. Shops,
Muscogee, I. T.

Dear Sir: The case of Will Holloway will be up for trial in some two or three weeks, and I may want to take your deposition. Will you please write me at once if I can take your deposition in some law office in Muscogee; also, please let me know if you still have the telegram which you received that night. I am informed by Mr. Holloway that the brakes on the engine were out of repair on the night of the accident. Let me know if this is true, and when you first knew that they were out of repair. As you will have no use for the telegrams, I will be obliged if you would send them to me, and I can then use them on the trial. Please write me at once. I herewith enclose stamped envelope for your reply.

(Signed) J. W. HOUSE."

This letter was dated April 8th. I received in reply to that the following letter, which is attached to the deposition; and marked Exhibit A, as follows:

"Denison, Tex. April 14, 1901.

Mr. J. W. House,
Little Rock, Ark.

Dear Sir: Your letter of the 8 just received this a. m. and was glad to hear from you, but will say in regard the deposition which you speak of in Will Holloway case, if the case comes up, don't you think it would be better for me to be present as a witness. I am not so busy that I can't come back to Little Rock. How do you expect to win the case without witnesses in the case? I will be glad to do everything I can to help Holloway out?

Please let me hear from you soon.

Very respy. yours,

W. H. DAVIS,
113 Gandy St., Denison, Tex."

On the 16th, I wrote to him as follows:

"W. H. Davis, Esq.,
Denison, Texas.

My Dear Sir: I have just received your letter of the 14th inst., and was indeed very glad to hear from you. I would much prefer to have you here than to take your deposition, and if I knew what your evidence would be along the lines which I wrote you, I would be still more anxious to have you

here. As far as the telegram is concerned, I think the company will admit they were sent just as we have stated, but Will Holloway tells me that when the injury happened, you and he examined the brakes and saw that the brakes on the engine did not clasp the wheels, while the wheels of the tank in front were clasped by the shoes, thus showing that the brakes on the engine did not work. I would be obliged if you would let me know what your recollection is about this matter; that is to say, whether the brakes were in fix to work or not; if not, how long had they been out of repair. I would not agree to go to the expense of having you to come unless I knew what your testimony would be. The case is set down for the 6th of May. Will Holloway is not here now, but will be in a day or two and I can talk to him about the propriety of requesting you to return. Of course, I would be glad to have you here as a witness anyhow, but unless your testimony would be of some importance to us, it would be useless
128 for us to take your deposition, or for you to come.
Please let me hear from you and I will write you further. Yours truly,

J. W. HOUSE."

In reply to that, I received the following letter, which is attached to the deposition as Exhibit B:

"Denison, Tex., April 18, 1901.

Mr. J. W. House,

Dear Sir: Your letter just received and was pleased to hear from you and will say in regards to the case, I am very glad to know that it is set off for a few days. Mr. House, you spoke in your last letter about expenses in having me come back to Little Rock. I am a friend to Will Holloway, and I am sure I wouldn't do him any harm, and furthermore, I think I could be of a great help to you in the case in making it stronger. There are some things that probably Will Holloway don't remember. By the way, I understand your letter, and in such a case, I believe I would be a great help to you. Of course, understand me that I am not trying to force myself on as a witness, if I didn't think I was worth to you what it would cost you for my expenses, I wouldn't want to come, as I hope you may have great success in gaining the case, as I believe you are aware of the fact that the Gen. Supt. of the C., O. & G. R. R. Co. discharged me some time ago, and I don't think they had much grounds to do such as to discharge me, and so far as remembering things what happened, I believe I am good at such things, and probably would know

more than I would care to write. But if you are going to use me for a witness, I don't think that you will ever regret it. I will close for this time. Very resp. yours,

W. H. DAVIS,
113 East Gandy St., Denison, Tex."

In reply to that, I wrote on April 22nd, 1901, as follows:

"W. H. Davis, Esq.,

My Dear Sir: I have seen Mr. Holloway, and he has agreed to pay your expenses here, if you will return. I can arrange here to get you a pass over the road, and will agree to pay your other incidental expenses upon your trip here when you arrive, or if you prefer, I can send you enough money to buy your ticket to this place. In any event, I want you to come and bring all the telegrams with you that you received the night of this accident. Now, I shall expect you to come, and when you do so, to come to my office at once, as I wish to talk with you before I put you on the witness stand.

Yours truly,
J. W. HOUSE."

In reply to that, I received letter, which is attached as Exhibit C to deposition, as follows:

"Denison, Texas, April 24, 1901.

Mr. J. W. House,

Dear Sir: Your letter received and was very glad to hear from you. In regards to expenses, please send me about $35.00 on account of expenses, and tell me where to come. I think it would be the best for me to be there a few days ahead of the trial. I shall expect all other expenses when I get to Little Rock, Ark. Very resp. yours,

W. H. DAVIS.

P. S. Answer at once, and tell me something near the amount of expense you will allow me. Answer at once."

In reply to that, I wrote April 25th, 1901, as follows:

129 "W. H. Davis,

My Dear Sir: I am just in receipt of your letter of the 24th inst. I am unwilling to send you as much as $35.00 to pay your expenses here. Your railroad fare here would be about $9.00. I am willing to send you $10 and pay you $1.50 per day while here for your expenses, and if you then desire to go back to Denison, to pay your expenses back. Your demand is entirely unreasonable, and I do not have to depend on your evidence for success in this case. You can either accept this or not, just as you like. Yours truly,

J. W. HOUSE."

Now, I wish to state further that Davis was in my office three times, as I remember. Once he came alone to advise with me about bringing his own suit, a suit against the railroad company for the same thing. He advised me that he had given the Company a receipt in full for all damages, and I told him, under the law, that he couldn't recover; that that was a contract, he had accepted whatever it was, and he had to abide by it. That was after the two conversations I had when Mr. Holloway was present in my office, and I talked with him fully, as I always do witnesses in any case that I have, in reference to what we could show by him in reference to the telegrams. He said the telegrams were over at his house, and he would produce them either at his deposition or in court. He told me in substance what they were, as has been shown by the other evidence in this case, and he said too, substantially as Mr. Holloway stated, that he saw some object at first; he thought it was a shadow. I am not stating anything unless I think it is in his deposition. I don't care anything about it, except that he states that he had no conversation with Will Holloway in my office at all. He stated that he immediately saw that it was some obstruction in the way and he applied the brakes at once, and my recollection is, he said it was anywhere from 40 or 50 or 60 feet in front of the engine when he first observed it. That is my recollection as to his statement; that is all I desire to state.

Defendant here read in evidence the following rule:

"200. Every person accepting a position with this company does so with the full knowledge of the dangers incident to the operating of railroads, and is required to exercise great care
in the performance of his duties, to prevent accident to
130 himself or others, and to see that the machinery or tools
which he is to use are in a safe condition to perform the services required and to report defects as per rule 203."

This was all the testimony in the case on both sides.

131 By consent of parties, the jury was to view the locomotive, or one exactly like the locomotive, on which plaintiff was at the time of the accident. Whereupon, the Court gave the following instructions to the jury in relation to this matter:

Gentlemen of the jury, you have the right to look at it.

(In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a

man is employed for several hours doing work on the engine as a fireman, i. e. whether he could easily see them by just keeping his eyes open.)

To the giving of the above paragraph of said instructions, enclosed in parenthesis, the defendant at the proper time objected and saved its proper exceptions.

(Now, the Court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad, or whether it is a saw mill man, or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employee has the right to rely upon that fact, without any examination made by himself, that the Company did furnish him with reasonably safe machinery, and that it had been examined by inspectors and the proper officers of the Company before it was turned over to them, except where it is defective, and his attention has been called to the defect, and for that reason he was told that they want it taken to the shops, or "you must be careful with it, because there are certain defects in this machinery." If these are pointed out to him, then he assumes the risk, if he goes on it.)

To the giving of the above paragraph of said instructions, enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

132 But, on the other hand, I also want to call your attention, and that is the reason you are taken there now, to another matter. A man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open.

Now, if for that reason, that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours, (without hunting for it) then the Court will tell you that he had knowledge of and ought to have known of it, and he is chargeable with it, as if he had known it.

(To the giving of that part of the above paragraph enclosed in brackets, being the words "without hunting for it," the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.)

(Now, you, gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks and looking out to see whether you could find out and ascertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to Brinkley, and if by simply discharging his duties as a fireman, he was bound to have noticed it, then the law supposed that he had notice of it.)

To the giving of the above paragraph of said instructions, enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

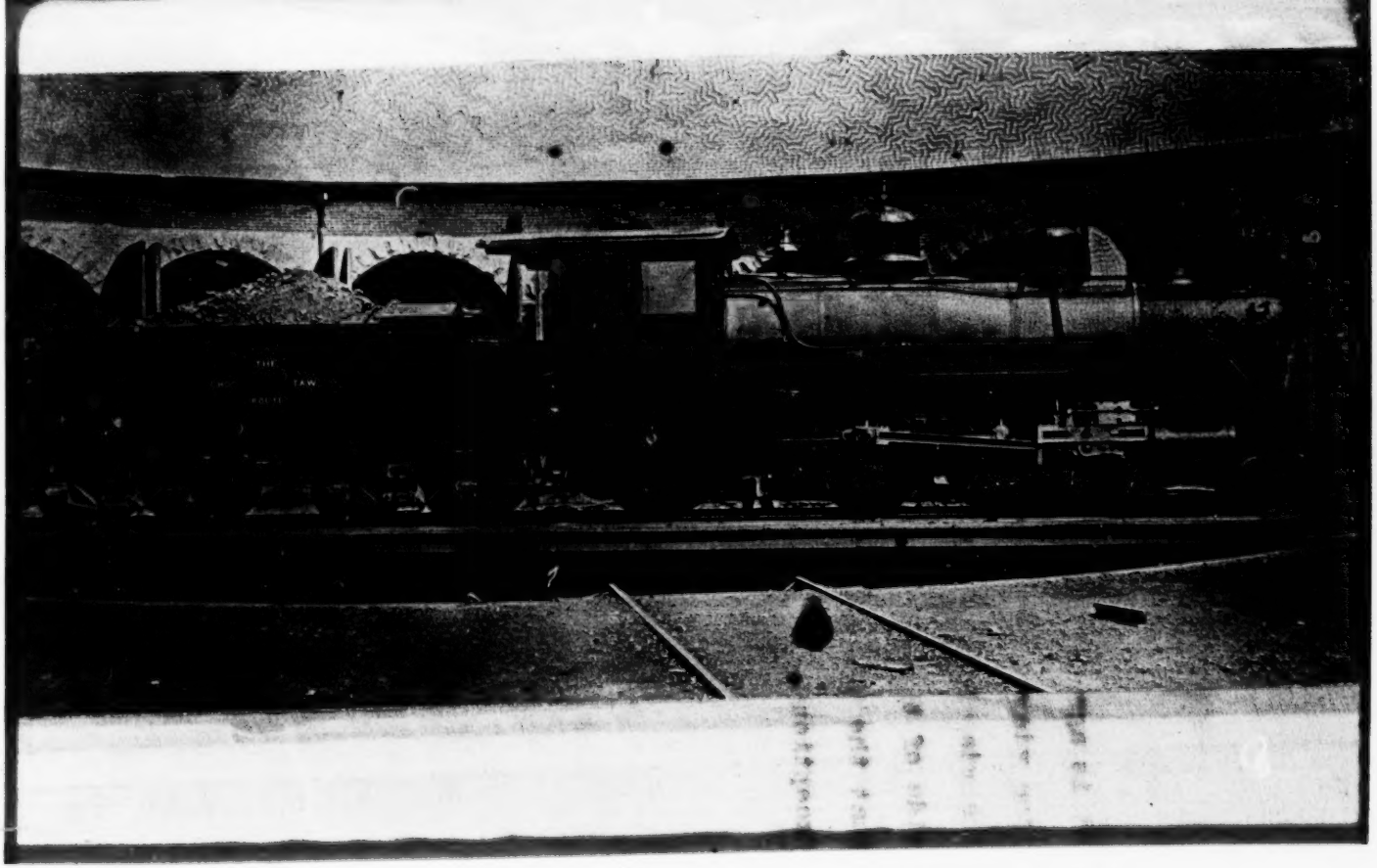
(If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion.)

133 To the giving of the above paragraph of said instructions enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

Of course, you need not report to the court what you saw, or what conclusions you reach. That will be for you to determine when you retire to the jury room for the purpose of making up your verdict, and you are only taken down there for the purpose of looking at the locomotive, as part of the evidence in this case, as there seems to be a conflict, some of the witnesses testifying that they can't help but see it, and the plaintiff himself says that he did not see it, although he acted as a reasonably prudent man, and that his attention was not called to it.

If a reasonably prudent person, employed as a fireman, having taken a trip of six hours duration on it, getting on and getting off for that purpose, and then again getting on for the purpose of making his trip, if a reasonably prudent person who is exercising ordinary diligence, could have seen it, then he will be chargeable with it, but he need not hunt for it and need not look for it; he has a right to presume that it was a reasonably safe machine, or if it was not, that his attention would be called to it.

The jury thereupon retired to view said engine, and a photograph of the engine viewed by them, by agreement of counsel, is hereto attached.



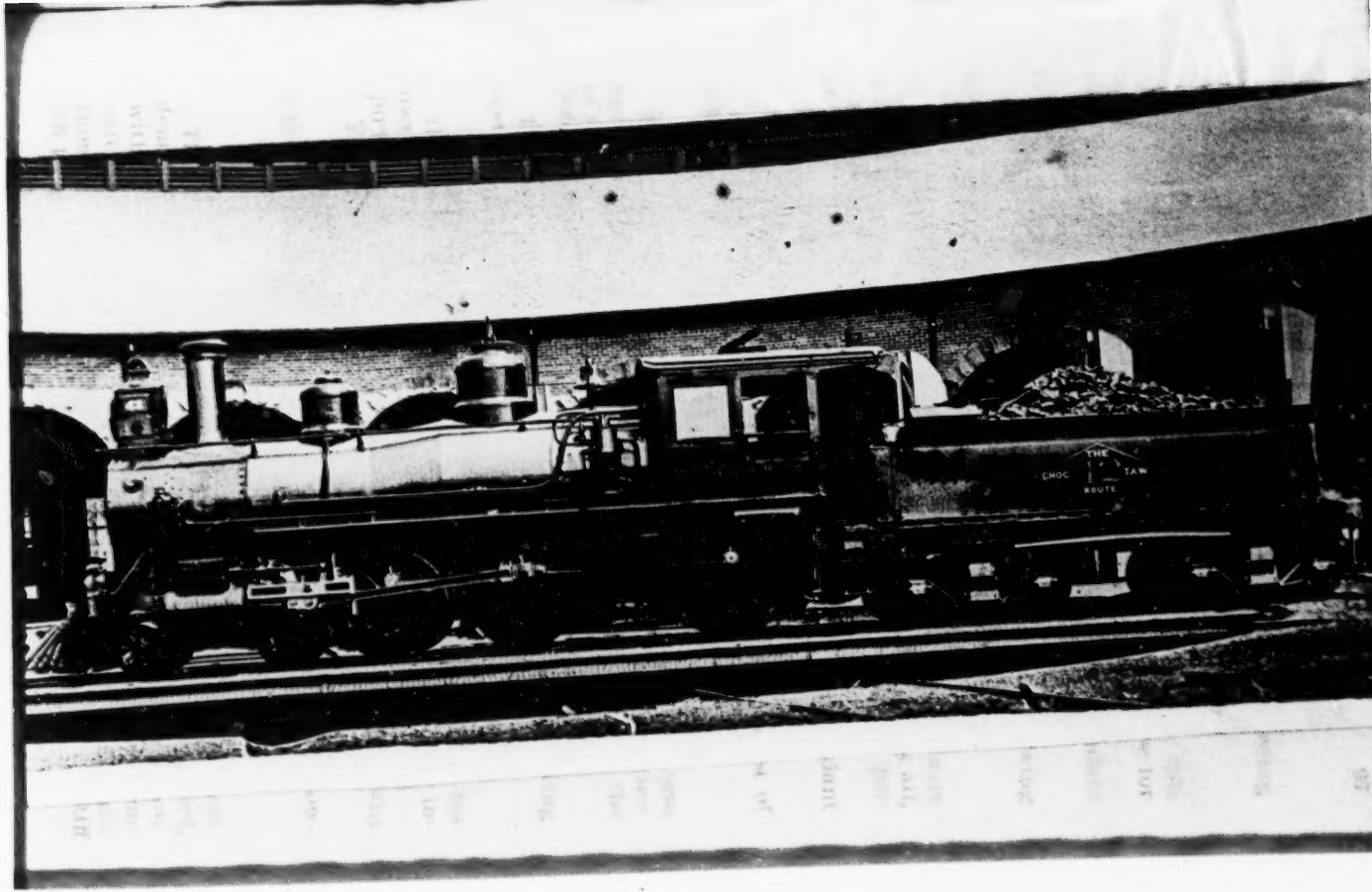
It is agreed that this is a picture of the engine introduced by the jury in this case, and that the plaintiff is taken looking at the engineer's side of the engine. And it is further agreed that the same may be incorporated in the Bill of Exceptions.

E. B. Peirce,

Attorney for Railroad.

J. W. House,

Attorney for Holloway.


THE
CHOC
TAW
ROUTE

It is agreed that this is a picture of the engine viewed by the jury in this case, and that the view is taken looking at the fireman's side of the engine. And it is further agreed that the same may be incorporated in the Bill of Exceptions.

E. B. Peirce,

Attorney for Railroad.

J. W. House,

Attorney for Holloway.

Instructions.

134 The defendant asked the Court to give the following instructions:

1.

The Court instructs the jury that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instructions:

2.

The Court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge.

The Court refused to give said instruction, and the defendant saved its exceptions.

The Court gave the following instruction, at the request of defendant:

3.

The Court instructs the jury that the presence of the horse upon the track of the defendant railroad company at the time of the injury in this case was not negligence on the part of the defendant.

The defendant also asked the court to give the following instruction:

4.

If the jury believe from the evidence that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant.

The Court refused to give said instruction, and the defendant saved its exceptions.

135 The defendant also asked the court to give the following instruction:

5.

The Court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cow-catcher, was a dangerous method of riding, so far as obstructions on the track or roadbed were concerned, and the plaintiff knew, or had reasonable cause to know it, then the plaintiff

would be guilty of contributory negligence, and cannot recover; and that too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether the plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

6.

The Court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

7.

The Court instructs the jury that if they find from the evidence that it was dangerous to travel upon an engine backwards, as the proof shows this engine was running, and that plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot
136 recover, and that too regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

8.

The Court instructs the jury that an employee is required to observe patent defects in the machinery about which he is employed and is bound to assume the risk incident thereto to the same extent as if their existence had been with his actual knowledge.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

9.

The Court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangerous and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

10.

You are instructed that if, before leaking Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have informed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then
137 his failure to take such precautions was negligence on his part, and will bar his recovery in this case, and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair and was to go to the work shop to be overhauled, and all other facts and circumstances surrounding the case.

The Court refused to give said instruction, and the defendant saved its exceptions.

Court's Charge.

The Court thereupon, of its own motion, charged the jury as follows:

Gentlemen of the jury: This is an action to recover damages for injuries alleged to have been sustained by the plaintiff while in the employ of the defendant railroad company, in an accident alleged to have been caused through the negligence of the railroad company. In actions of this kind the liability of a railroad is quite different from that in case of a passenger. The law governing the liability of a railroad for injuries sustained by an employe is that of master and servant. There is no greater liability assumed by a railroad toward its employes than that of any other employer, whether a corporation or an individual.

(The railroad company is not an insurer of its employes; all that is required of it by the laws of the country is to

furnish its employes working tools which are reasonably safe, and a place to work in, which is reasonably safe. If it does that then it has discharged its duty, and in case of accident to one of its employes it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employe with tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries.)

To the giving of the above paragraph of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner, objected and saved its exceptions.

138 The burden of proof to establish the facts that the plaintiff was injured and that the injury occurred by reason of the negligence of the defendant, is on the plaintiff, and he must establish both of these facts by a preponderance of the evidence. The mere fact that he was injured while engaged in the service of the defendant is not sufficient to entitle him to a verdict; he must also show that he sustained the injury by reason of the defendant's negligence.

(Negligence in cases of this kind consists in the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employe knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely.)

To the giving of the above paragraph of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

(The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you can consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time the alleged injuries were sustained by him, was not supplied with proper brakes and brake-shoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had,

must have known of the danger of riding on it, while running backward, without any headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made the trip on it as a
139 fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person, under all the circumstances, should have known that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant.)

To the giving of the above paragraph of said charge enclosed in brackets, the defendant, at the proper time and in the proper manner, objected, and saved its proper exceptions.

(That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of the plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as a fireman for a trip of 58 to 60 miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more.)

To the giving of the above paragraph of said charge enclosed in brackets, the defendant, in the proper manner and at the proper time, objected, and saved its proper exceptions.

But, if you find the facts otherwise, i. e., that he did not know this or could not have known it as a reasonably prudent person, then it will be necessary for you to determine other facts.

(In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and
140 found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious

defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years has been a locomotive fireman.)

To the giving of the above paragraph of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner, objected, and saved its proper exceptions.

Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff received his alleged injuries was caused by reason of want of brakes on the engine. For if the accident would not have been prevented, even if there had been suitable brakes on the engine, then plaintiff cannot recover anything in this action, and your verdict should be for the defendant.

(On this issue the evidence is conflicting.)

To the giving of the above sentence of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner, objected, and saved its proper exceptions.

Only two persons were present at the time the accident happened, the plaintiff and Davis, the engineer.

The plaintiff testified that, while he did not see the horse which caused the accident, the engineer called to him "look out, look out;" that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine, had it been supplied with proper brakes, but having no brakes on the engine, the failure to stop the engine as rapidly as could have been done if supplied with brakes caused the accident whereby plaintiff was injuried. On the other hand, the engineer testified that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so you are to take into consideration all the circumstances existing at the time; the kind of a night it was, the fact that the locomotive was running backward; that there was no light in front; that the engineer kept as good
141 a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact, whether, even if there had been brakes, the engine could have been stopped before striking the horse, after its presence on the track had been discovered by the engineer.

(If you find that the fact of the engine being without brakes was unknown to plaintiff and could not have been known to

him by the exercise of reasonable diligence under the circumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff,) but if you find either of these facts the other way, your verdict should be for the defendant.

To the giving of that part of the above paragraph of said charge enclosed in brackets, commencing with the words "If you find that," and ending with the words "should be for the plaintiff" the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

If your verdict is for the plaintiff on these issues, the next thing for you to determine is, was he injured in this accident. If you find that he was, then he is entitled to compensation, as I shall fully explain to you, but if you find that he was not injured in that accident, he is, of course, not entitled to any verdict.

(The measure of damages, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident;)

To the giving of the above part of said charge enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

(next, the loss of wages during the time that he has, by reason of these injuries, been incapacited from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what
142 he would have earned if uninjured and what they think he will earn in his present condition, making such allowance for such time hereafter as, in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident.)

To the giving of the above part of said charge enclosed in brackets, the defendant, at the proper time and in the proper manner, objected, and saved its proper exceptions.

The table showing the probability of his life which have been introduced are not conclusive, but may be considered by you, with such other facts as your good sense and judgment tell you to use for the purpose of determining for how long, if at all, the plaintiff should receive such compensation. You

may also allow him compensation for the pain and suffering, if any, caused by this accident. This pain and suffering includes both mental and physical. The amount of such compensation must be determined by you, as neither the law nor any person can fix an exact basis for compensation for pain and suffering. Such a matter is left to the good judgment of the jury, who must act as reasonable men, without any favor or prejudice.

While it is hardly necessary for me to mention this fact to you, yet it will do no harm to say to you that, in determining what your verdict shall be in this case, you are not to be influenced in any wise by the fact that the defendant is a corporation or railroad company, nor that the plaintiff is a working man and perhaps in needy circumstances. The law knows no distinction between rich and poor, high and low. Your duty is to render a true and correct verdict according to the law and the evidence, regardless of any one's standing, and uninfluenced either by sympathy or prejudice. If you do that your verdict is a just one; if you do not, it is an unjust one.

You may now retire and consider your verdict.

These were all the instructions asked, given and refused in the case.

143 The jury returned a verdict in favor of the plaintiff for $1600.00.

And now comes the defendant, the Choctaw, Oklahoma & Gulf Railroad Company, with its bill of exceptions, containing all the evidence, instructions and exceptions saved, and tenders the same to the court, praying that the same may be examined, approved, signed and ordered filed and made a part of the record in this cause, which is now hereby done.

Witness my hand as Judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, this 21st day of June, 1901.

JACOB TRIEBER,
United States District Judge.

Which petition for writ of error and allowances thereof is as follows.

144 In the U. S. Circuit Court, Eastern District of Arkansas, Western Division.

Will Holloway, Plaintiff and Defendant in Error,
vs.
Choctaw, Oklahoma and Gulf Railroad Company, Defendant and Plaintiff in Error.

Petition for Writ of Error and Orders.

The Choctaw, Oklahoma and Gulf Railroad Company, defendant in the above entitled case, feeling itself aggrieved by the verdict of the jury and the judgment rendered on the 8th day of May, 1901, comes now by J. W. McLoud and E. B. Peirce, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the 8th Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and upon the filing of said security all further proceedings in this case be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the 8th Circuit, and your petitioners will ever pray.

J. W. McLOUD,
E. B. PEIRCE.
Attorneys for defendant.

Writ of error granted and upon filing of a bond in the sum of $2500.00 to be approved by me, judgment will be superseded.
(Signed) JACOB TRIEBER,
Judge.

Filed June 22nd, 1901. W. P. Feild, Clerk.

145 Which assignment of errors is as follows:

In the U. S. Circuit Court, Eastern District of Arkansas, Western Division.

Will Holloway, Plaintiff and Defendant in Error,
vs.
Choctaw, Oklahoma and Gulf Railroad Company, Defendant and Plaintiff in Error.

Assignment of Errors.

The plaintiff in error, the Choctaw, Oklahoma and Gulf Railroad Company, makes the following assignment of errors in the above entitled case.

First. The verdict of the jury is contrary to the evidence.

Second. The verdict of the jury is contrary to the instructions of the Court.

Third. The verdict of the jury is contrary to the evidence and the instructions of the Court.

Fourth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman, i. e., whether he could easily see them by just keeping his eyes open."

Fifth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, the Court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad, or whether it is a saw-mill man or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employe has the right to rely upon that fact, without any examination made by himself, that the Company did furnish him with reason-
146 ably safe machinery, and that it had been examined by inspectors and the proper officers of the Company before it was turned over to them, except where it is defective, and his attention has been called to the defect, and for that reason, he was told that they want it taken to the shops, or 'you must be careful with it, because there are certain defects in this machinery.' If these are pointed out to him, then he assumes the risk, if he goes on it."

Sixth. The Court erred in giving that part of its charge to the jury in words as follows:

"Without hunting for it."

Seventh. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, you, gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks and looking out to see whether you could find out and assertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to

Brinkley, and if by simply discharging his duty as a fireman, he was bound to have noticed it, then the law supposes that he had notice of it."

Eighth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion."

Ninth. The Court erred in refusing to give instruction No. 1, asked by the defendant, in words and figures as follows:

"The Court instructs the jury that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant."

147 Tenth. The Court erred in refusing to give instruction No. 2 asked by defendant, in words and figures as follows:

"The Court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge."

Eleventh. The Court erred in refusing to give instruction No. 4 asked by defendant, in words and figures as follows:

"If the jury believe from the evidence that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant."

Twelfth. The Court erred in refusing to give instruction No. 5 asked by defendant, in words and figures as follows:

"The Court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cow-catcher, was a dangerous method of riding, so far as obstructions on the track or roadbed were concerned, and the plaintiff knew, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence, and cannot recover; and that too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine."

Thirteenth. The Court erred in refusing to give instruction No. 6 asked by defendant, in words and figures as follows:

"The Court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover."

Fourteenth. The Court erred in refusing to give instruction No. 7, asked by defendant, in words and figures as follows:

"The Court instructs the jury that if they find from the
148 evidence that it was dangerous to travel upon an engine backwards, as the proof shows his engine was running, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot recover; and that too, regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride."

Fifteenth. The Court erred in refusing to give instruction No. 8 asked by the defendant, in words and figures as follows:

"The Court instructs the jury that an employe is required to observe patent defects in the machinery about which he is employed, and is bound to assume the risk incident thereto to the same extent as if their existence had been within his actual knowledge."

Sixteenth. The Court erred in refusing to give instruction No. 9 asked by defendant, in words and figures as follows:

"The Court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him."

Seventeenth. The Court erred in refusing to give instruction No. 10 asked by defendant, in words and figures as follows:

"You are instructed that if, before leaving Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have informed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then his failure to take such precautions was negligence on his part, and will bar his recovery in this case; and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair and was to go to the work shop to be overhauled, and all other facts and circumstances surrounding the case."

149 Eighteenth. The Court erred in giving that part of it charge to the jury in words and figures as follows:

"The railroad company is not an insurer of its employes; all that is required of it by the laws of the country is to furnish its employes working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employes it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employe with tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries."

Nineteenth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"Negligence in cases of this kind consists of the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employe knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely."

Twentieth. The Court erred in giving that part of the charge to the jury in words and figures as follows:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you are to consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time of the alleged injuries sustained by him, was not supplied with proper brakes and brakeshoes on the engine, was known to the plaintiff or not,

150 or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made a trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person, under all the circumstances, should have known

that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant."

Twenty-first. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of 58 to 60 miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more."

Twenty-second. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the Company to furnish him with
151 reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the Company had been inspected and found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years had been a locomotive fireman."

Twenty-third. The Court erred in giving that part of its charge to the jury in words and figures as follows.

"On this issue the evidence is conflicting."

Twenty-fourth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the cir-

cumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff."

Twenty-fifth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"The measure of damages, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident."

Twenty-sixth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"next, the loss of wages during the time he has, by reason of these injuries, been incapacitated from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured and what they think he will earn in his present condition, making such al-
152 lowance for such time hereafter, as in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident."

Twenty-seventh. The Court erred in not directing the jury to bring in a verdict for the defendant, because the record shows that the whole evidence was insufficient, under the law, to support the allegations of the complaint.

Wherefore, for the errors above assigned, the defendant and Plaintiff in Error prays that the judgment rendered in this case be reversed, set aside, and held for naught.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for Defendant and Plaintiff in Error.

Filed June 22nd, 1901. W. P. Feild, Clerk.

Which supersedeas Bond is as follows:

153 Know all men by these Presents, that we, Choctaw, Oklahoma & Gulf Railroad Company, J. T. Beal and Jas. J. Mandlebaum, are held and firmly bound until Will Holloway, in the full and just sum of Twenty-five hundred and no-100 Dollars to be paid to the said Will Holloway, heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 20th day of June in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the April term A. D. 1901, of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in a suit depending in said Court between Will Holloway plaintiff and Choctaw, Oklahoma and Gulf Railroad Company, defendant, judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company, and the said Choctaw, Oklahoma & Gulf Railroad Company has obtained a writ of Error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Will Holloway citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

CHOCTAW, OKLAHOMA & GULF RD. CO. [Seal]
By E. B. PEIRCE, Its Atty.
J. T. BEAL, [Seal]
JAS. J. MANDLEBAUM, [Seal]

Approved by
JACOB TRIEBER, Judge

Filed June 22, 1901. W. P. FEILD, Clerk.

154 The United States of America, to Will Holloway—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, wherein The Choctaw, Oklahoma and Gulf Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this 22nd day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,

United States District Judge, for the Eastern District of Arkansas.

Service acknowledged.
J. W. HOUSE,
Atty. for Holloway.

Indorsed: Filed June 22, 1901. W. P. Feild, Clerk.

155 United States of America, Western Division of the Eastern District of Arkansas.

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing . . . .annexed to this certificate is a true, correct and compared copy of the originals remaining of record in my office, and constitute a true copy of the record, of the assignment of errors and of all proceedings in case of Will Holloway vs. Choctaw, Oklahoma and Gulf Railroad Company.

In witness whereof, I have hereunto set my hand and the seal of said Court, this Thirteenth day of July, in the year of our Lord, One Thousand Nine Hundred and one, and of the Independence of the United States of America, the One Hundred and twenty-sixth.

The Seal of the Circuit Court U. S. A. Western Division of East. Dist. Ark.

W. P. FEILD, Clerk.

Attest:

Filed Jul 25, 1901. John D. Jordan, Clerk.

(*Appearance for Plaintiff in Error.*)

And on the twenty-ninth day of July, A. D. 1901, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals, in said cause, in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

The clerk will enter our appearance as counsel for the plaintiff in error.

J. W. McLOUD.
E. B. PEIRCE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1625. The Choctaw, Oklahoma and Gulf Railroad Company, pl'ff in error, *vs.* Will Holloway. Appearance. Filed Jul- 29, 1901, John D. Jordan, clerk. J. W. McLoud, E. B. Peirce, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the eighteenth day of September, A. D. 1901, an appearance of counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

The clerk will enter my appearance as counsel for the defendant in error.

J. W. HOUSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1625. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Will Holloway. Appearance. Filed Sep. 18, 1901. John D. Jordan, clerk. J. W. House, counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the sixth day of January, A. D. 1902, an appearance of Mr. C. B. Stuart, as counsel for the plaintiff in error, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. B. STUART.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1625. The Choctaw, Oklahoma & Gulf Railroad Co., pl'ff in error, *vs.* Will Holloway. Appearance. Filed Jan. 6, 1902. John D. Jordan, clerk. C. B. Stuart, counsel for pl'ff in error.

(*Order of Submission.*)

And on the seventh day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

TUESDAY, *January* 7, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. E. B. Peirce in behalf of the plaintiff in error; continued by Mr. J. W. House for the defendant in error and concluded by Mr. C. B. Stuart for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the thirty-first day of March, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1901.

THE CHOCTAW, OKLAHOMA AND Gulf Railroad Company, Plaintiff in Error, *vs.* WILL HOLLOWAY, Defendant in Error.	No. 1625. In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. E. B. Peirce and Mr. C. B. Stuart (Mr. J. W. McLoud was with them on the brief) for plaintiff in error.

Mr. J. W. House (Mr. M. House was with him on the brief) for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Syllabus.

1. Negligence—Limit of duty of master is to exercise ordinary care.—It is error to instruct a jury that it is the duty of the master to provide reasonably safe appliances, tools or working places for his servants or to keep them in a reasonably safe condition of repair. The limit of the duty of the master is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employés with reasonably safe appliances, machinery, tools and working places and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair.
2. Error—Prejudice presumed from.—The legal presumption is that error produces prejudice. It is only when it appears beyond all doubt from the record that the error complained of did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable.
3. Error without prejudice.—Where the court rightly charges the jury on the conceded facts that the master was negligent as a matter of law, an erroneous charge relative to the degree of care required of the master, appears beyond all doubt to be error without prejudice, because no question of the negligence of the master was submitted to the jury for their determination.
4. Master and servant—Duty of servant—Assumption of risk.—The servant assumes all the ordinary risks of the employment which are known to him and which would have been known

by the exercise of ordinary care to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and working place and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation.

5. Verdict—Sufficiency of evidence—Inspection.—The court may not reverse a judgment because there was no evidence to support a finding of fact by a jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects of which is in issue, because the evidence derived from the inspection is not, and cannot be presented to the appellate court for consideration.
6. Negligence—Concurrence of third party no excuse for.—One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.
7. Negligence—Failure to provide brakes for road engine is.—The failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, evidence of the want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad.
8. Proximate cause of collision—Absence of brakes on engine may be.—Collisions and accidents may be reasonably anticipated as the natural and probable consequence of the failure to provide brakes to control the movements of road engines.
9. Contributory negligence concerning, or assumption of known risks no defense to action for damages from unknown risks.—Contributory negligence regarding, or assumption by a servant of known risks will not constitute contributory negligence regarding, or the assumption of an unknown risk, nor a defense for the master whose negligence produces it. A servant knew and assumed the risks of running an engine backward, tender foremost, in the night, without any light or employé on the forward end of the tender. *Held*, that his contributory negligence and assumption of risks in this regard constituted no defense to his action against the master for negligence in failing to supply the engine with brakes, where he did not know, and a person of reasonable prudence and discretion, exercising ordinary care, would not, in his situation, have known of the absence of the brakes.

Statement.

In the early morning of October 30, 1900, while it was yet dark, a road engine of the Choctaw, Oklahoma & Gulf Railroad Company collided with a horse which was caught in a trestle as the engine was backing, tender foremost, from Brinkley to Hulbert, and in-

jured Will Holloway, the defendant in error. There was no light on the forward end of the tender and no employé there to warn of danger. There was no brake on the engine, although there was a brake upon the tender. Holloway was a fireman working on the engine. He was aware of the darkness of the night, of the absence of a light and of an employé upon the end of the tender, but he insisted that he did not know that there was no brake upon the engine. He sued the company for negligence in that it failed to supply the engine with a proper brake, alleged that the accident would not have occurred if such a brake had been provided and that through its absence he was caught between the tender and the engine when the air was applied to the brake upon the tender and seriously injured. The court instructed the jury that if there was no brake upon the engine and Holloway did not know, and would not by the exercise of reasonable diligence and prudence have known that the engine was supplied with a brake and if the absence of the brake caused the accident, the company was liable and they might return a verdict against it, but that if there was a failure of proof of either of these facts, their verdict must be for the defendant. This instruction and the refusal of the court to instruct the jury to return a verdict for the defendant are the principal errors assigned by the company, although many others are specified.

SANBORN, circuit judge, after stating the case as above, delivered the opinion of the court:

Actionable negligence is a breach of duty. Where there is no breach of duty there is no negligence and there can be no recovery. It is not the duty of the master to furnish his servants with reasonably safe appliances, machinery, tools or working places, or to keep them in a reasonably safe condition of repair, his failure to do so is not the breach of any duty and it furnishes no basis for an action of negligence. The limit of his duty here is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employés with reasonably safe appliances, machinery, tools and working places and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980; *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48; *St. Louis, I. M. & S. R'y Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Louisville & N. R. Co. v. Johnson*, 81 Fed. 679, 680, 27 C. C. A. 367, 368; *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *id.* 22 C. C. A. 269, 76 Fed. 443.

A servant may assume that his master has discharged this duty unless he knows, or by the exercise of reasonable care he would have known that the duty had not been discharged and that there were defects in the machinery and appliances with which, or in the place in which he undertakes to work. On the other hand, the servant assumes all the ordinary risks and dangers of the employment upon which he enters so far as they are known to him and so far as they would have been known to a person of ordinary prudence

and care by the exercise of ordinary diligence. He is not required to search for latent defects or hidden dangers; but it is his duty to exercise reasonable diligence to observe, and be cognizant of all obvious defects in the machinery and appliances with which he is working and he assumes the risks and dangers of all such defects of which he has knowledge and of which he would have had knowledge by the exercise of ordinary care and diligence. *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 344; *Fordyce v. Edwards*, 60 Ark. 438, 442; *Anderson v. Railway Co.*, 39 Minn. 523; *Little Rock &c. Railroad Co. v. Leverett*, 48 Ark. 347; *Wormell v. Railroad Co.*, 79 Me. 405; *Way v. Railroad Co.*, 40 Ia. 341; *Batterson v. Railway*, 53 Mich. 125; *Illick v. Railway Co.*, 67 Mich. 632; *Morton v. Railroad Co.*, 81 Mich. 435.

The plaintiff in this case alleged that his injury was caused by the failure of the railroad company to provide the engine upon which he was working as fireman with suitable brakes to arrest its motion when occasion required. The court charged the jury that if there was no brake upon the engine, if the absence of the brake caused the injury and if the plaintiff was not aware of the fact that the engine was not provided with a brake and if a person of ordinary prudence exercising reasonable care would not under the circumstances of this case have been aware of this fact, they might render a verdict against the company. It is contended that this charge was erroneous, (1) because there was no substantial evidence to warrant the finding of the jury that the plaintiff did not know, or by the exercise of ordinary care would not have known of the absence of the brake, (2) because there was no substantial evidence to warrant their finding that the injury could have been avoided by the presence of the brake upon the engine and (3) because there was no substantial evidence to warrant the finding that the absence of the brake was the proximate cause of the injury. A careful and painstaking examination of the testimony has satisfied us, however, that this position cannot be sustained. The plaintiff testifies that he was not aware that the engine was not furnished with a brake. Another witness who was employed about the engine as a brakeman for some time demonstrates by his testimony that he did not know whether there was a brake on the engine or not; and the jury made an ocular inspection of an engine of the same character as that upon which the accident occurred for the express purpose of determining this question and they found this issue in favor of the plaintiff. The knowledge upon this question which an inspection of the engine conveyed to the minds of the jurors is not and cannot be presented to this court by the record and we cannot undertake to say that all reasonable men with the testimony and the knowledge which this jury lawfully acquired would necessarily come to a conclusion contrary to that which these jurors have reached. *McReynolds v. Burlington &c. R'y Co.*, 14 Am. & Eng. Railroad Cases 172, 174; *Chicago & Iowa R. R. Co. v. Hopkins*, 90 Ill. 323.

Upon the question whether or not the engine could have been stopped after knowledge of the presence of the horse in the trestle in time to prevent the accident, the testimony was not so clear that it

was the duty of the court to withdraw this issue from the jury. Nor can it be properly said as a matter of law that the absence of this brake was not the proximate cause of the injury. It is undoubtedly true that one of the proximate causes of the accident was the negligence of the party who permitted the horse to stray into the trestle. But if the injury would not have been inflicted if there had been a brake upon the engine, it cannot be truthfully said that the absence of this brake was not another of the proximate causes of the damage, inasmuch as the accident would not have happened if the brake had been provided. If it be true, as the jury have found, that no injury would have been inflicted upon the plaintiff if this engine had been provided with a brake, it is no defense for the railroad company that the concurring negligence of the owner of the horse contributed to the infliction of the injury. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence. It is no defense for a wrong-doer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. *Union Pac. R'y Co. v. Callaghan*, 12 U. S. App. 541, 56 Fed. 988, 6 C. C. A. 205; *Chicago, R. I. & P. R'y Co. v. Sutton*, 27 U. S. App. 310, 312, 63 Fed. 394, 395, 11 C. C. A. 251, 252–'3; *Railway Co. v. Chambers*, 68 Fed. 148, 153, 15 C. C. A. 327, 332; *St. Louis, I. M. & S. R'y Co. v. Needham*, 69 Fed. 823, 824, 16 C. C. A. 457, 458; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 702; *Harriman v. Railway Co.*, 45 Oh. St. 11, 32; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145; *Cayzer v. Taylor*, 10 Gray 274; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38; *Cone v. Railroad Co.*, 81 N. Y. 206.

Nor does the absence of brakes from this engine fall without the legal definition of the proximate cause of the injury which the plaintiff suffered. An injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen nor reasonably anticipated as the probable result of such an act cannot be made the basis of an action for damages. The purpose of brakes upon engines and cars is to quickly arrest their speedy motion and to prevent collisions and accidents. The natural and probable consequences of their absence from machines as powerful and as rapid in their movements as locomotive engines are the collisions and accidents which it is the purpose of their use to avoid. From the failure to provide this engine with proper brakes to arrest its motion the accident and injury which resulted or others of like character might well have been anticipated as probable consequences, and the evidence in the record is ample to sustain the finding of the jury that the injury to the plaintiff was caused by that absence. The very fact that it is the common, the almost universal practice to provide locomotive engines with brakes for the purpose of controlling their movements and preventing accidents and collisions is very persuasive, if not conclusive evidence that such disasters may be reasonably anticipated as, and are the probable consequences of their ab-

sence. *Chicago, St. P., M. & O. R'y Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347; *Railway Co. v. Kellogg*, 94 U. S. 469, 475.

It is assigned as error that the court instructed the jury that the failure of the company to provide this engine with brakes was actionable negligence for which the defendant was liable. But this specification is untenable. Actionable negligence in this case was the failure of the railroad company to exercise reasonable care to provide a reasonably safe engine for operation upon this railroad. The plaintiff testified that he had never worked upon an engine before which was not provided with a brake, although he had been in the employment of railroad companies for some years. The knowledge that it is the usual practice to provide road engines with brakes to control and arrest their motion is so common and general that courts cannot assume to be ignorant of it. Courts take judicial notice of business customs and practices which form a part of the common knowledge of the people of the country. *Brown v. Piper*, 91 U. S. 37, 42, 1 Greenleaf's Evidence, 11. There may be, and probably are circumstances under which the absence of a brake from an operating engine would not constitute a want of reasonable care to provide a reasonably safe locomotive for the purpose to which its use is applied. This might be true of an engine employed in a yard for switching purposes. It might be true under many circumstances which could be shown by evidence. But in the case at bar the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines. This, then, was the case presented to the court below: Railroad companies ordinarily provide their road engines with brakes. The exercise of ordinary and reasonable care induces carriers to equip their road engines in this way. The purpose of the exercise of this care is to prevent accidents and collisions. Such accidents and collisions are the natural and probable consequences of a failure to exercise this care. The conclusion was inevitable that the failure to provide this road engine with brakes, in the absence of any evidence excusing it, was a failure to exercise ordinary care to provide a reasonably safe engine for operation upon this railroad. And the charge of the court that the defendant was liable for any injury which resulted from the failure to provide the brakes is sustained by the evidence, the law and the reason of the case.

It is assigned as error that the court refused to instruct the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, that the greater the risk which attends the work to be done and the machinery to be used the more imperative is the obligation resting upon him and that if the plaintiff could by using ordinary care and diligence have informed himself of the condition of the engine as to brakes and if he failed to do so and an ordinarily prudent man under like circumstances would have done so, his failure to take such precautions was

negligence and would bar his recovery in the case. The rules which measured the respective liabilities of the plaintiff and the defendant in this case have been stated at the opening of this opinion. So far as this requested instruction conforms to those rules it was given in the general charge of the court and so far as it does not conform to them, it was erroneous and should not have been given. The court charged the jury that if the engine was without brakes and this fact was unknown to the plaintiff "and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case as shown by the evidence," the company might be liable, and when the entire charge is carefully read nothing inconsistent with this declaration can be found in it. There was no error in the refusal of the court to give the requests under consideration in view of the general charge which presented to the jury all the sound propositions of law stated therein.

Another specification of error is that the court refused to instruct the jury that if the plaintiff was guilty of negligence in riding on an engine backing with the tender foremost in the dark, without a light upon the forward end of the tender he could not recover. But there was no error in this refusal. The plaintiff could not recover for the negligence of the company in running this engine backward in the night without a light upon the forward end of the tender because the plaintiff was aware of this negligence and assumed the risk of it. But he did not know that the engine upon which he was riding was not provided with brakes. The exercise of ordinary care by the defendant would have equipped it with these appliances. He had the right to assume that the defendant had exercised this care. He did undoubtedly indulge in that assumption. The jury have found that the absence of the brakes was not an obvious defect, not a defect which a person of ordinary prudence exercising reasonable care would have discovered under the circumstances of this case. As he was ignorant of the absence of the brakes, he did not assume the risk of that absence and his assumption of the risk of riding upon an engine and tender in the night with a head-light upon its forward end was not an assumption of the risk of operating this engine without brakes. His negligence regarding, or his assumption of the former risks was neither such contributory negligence regarding, nor such an assumption of the latter risk as bars him from a recovery for the negligence of the defendant producing it. A servant may not assume a risk or be guilty of contributory negligence in exposing himself to a risk of which he is ignorant and of which an ordinarily prudent person would not have been aware by the exercise of ordinary care and diligence. *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 948–'9, 5 C. C. A. 341, 346; *O'Neill v. Chicago, R. I. & P. R'y Co.*, 86 N. W. 1098; *Railway Co. v. Keegan*, 87 Fed. 849, 852, 31 C. C. A. 255, 258.

Counsel for the defendant also complain that when the jury were sent to inspect the engine the court instructed them to "go inside and try to put themselves only in the same place that the fireman would naturally occupy and then occupying that place to determine whether the wheels of the engine on which the brakes would be

could be seen from there, without looking for them, while a man was employed for several hours doing work on the engine as a fireman, that is to say, whether he could easily see them by just keeping his eyes open." If this excerpt from the instructions of the court had been all that was said to the jury on this subject, it might have been erroneous. But it was followed with the direction that "a man cannot shut his eyes and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open" and that "if the fact that there were not any brake-shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours without hunting for it, then the court will tell you that he had knowledge of, and ought to have known of it and he is chargeable with it as if he had known it" and that "if in getting off and on and working and firing for six hours as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it who was a fireman by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion." Excerpts from a charge cannot be wrested from their connection and relation and fairly criticized. The entire charge upon a given subject must be taken together and if when so read it conforms to the law, no just objection to it can be urged. When the instruction of the court upon the duty of the jury in inspecting this engine is so read, it will be found to be in accordance with the established rules of law which control this case and which are stated in the opening of this opinion. There was no error in the instruction of the court upon this subject.

It is assigned as error that the court repeatedly instructed the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place. This instruction was a patent and unquestionable error. It has been so declared by this court repeatedly from *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68, decided in 1892, through *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980, *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48, *St. Louis, I. M. & S. R'y Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459, to and including *Lesser Cotton Co. v. St. Louis, I. M. & S. R'y Co.*, — Fed. —, decided in 1902. The limit of the duty of the master to the servant in the matter of place of service, of machinery and of appliances is to exercise ordinary care to furnish him with a reasonably safe place and reasonably safe appliances and to use ordinary care to keep the place and the appliances in a reasonably safe condition.

Moreover, the presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal, is applicable. *National Masonic Acc. Ass'n v. Shryock*,

20 C. C. A. 3, 11, 73 Fed. 774, 781; *Atchison, T. & S. F. R'y Co. v. McClurg*, 8 C. C. A. 322, 325–'6, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807–'8; *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Moores v. Bank*, 104 U. S. 625, 630; *Gilmer v. Higley*, 110 U. S. 47, 50; *Vicksburg & Meridian Railroad v. O'Brien*, 119 U. S. 99, 103; *Mexia v. Oliver*, 148 U. S. 664, 673; *Boston & Albany Railroad Co. v. O'Reilly*, 158 U. S. 334, 337; *Peck v. Heurick*, 167 U. S. 624, 629. But in the case at bar the record makes it clear beyond all doubt that this error did not prejudice and could not have prejudiced the railroad company, because no question concerning its duty or its negligence was left to the jury to consider by the charge of the court. The railroad company conceded that there were no brakes upon the engine. The absence of brakes upon this road engine, in the absence of any evidence excusing it, was conclusive evidence, as a matter of law, of the lack of ordinary care to provide reasonably safe machinery to operate this railroad. The court clearly and positively instructed the jury to this effect. It instructed them that the railroad company was liable for any injury that was caused by the failure to supply this engine with brakes, unless the plaintiff knew and assumed the risk of their absence. This left the jury nothing to consider relative to the care or the negligence of the company and limited the issues they were to determine to the questions whether or not the absence of the brakes was the proximate cause of the injury and whether or not the plaintiff knew, or ought to have known, and hence assumed the risk of this absence. As there was no question of the care or negligence of the company submitted to the jury, it conclusively appears beyond all doubt that the erroneous charge upon that subject could not have prejudiced the defendant, and error without prejudice is no ground for reversal.

There are other specifications of error which have not been recited in detail. They have all been carefully considered. So far as they present any debatable question, they have been disposed of by the rules and principles to which we have adverted and the discussion in which we have already indulged. Suffice it to say that a patient and painstaking review of all the evidence, of the charge of the court and of all the assignments of error has led us to the conclusion that this case was fairly and impartially tried and that the rulings and charge of the court were free from prejudicial error. The judgment below must therefore be *affirmed* and it is so ordered.

THAYER, *Circuit Judge:*

I concur in the order affirming the judgment below for the reason stated in the foregoing opinion but I would not be understood as concurring in the broad statement, which the opinion contains, that a servant "assumes the risks and dangers of all * * * defects" (in machinery and appliances) "of which he has knowledge and of which he would have had knowledge by the exercise of ordinary care and diligence." Nor do I think that such a broad statement of the law is necessary to a correct decision of the case. It is well settled that a servant who uses machinery, tools or appliances

known to be defective but, in pursuance of a promise by the master that they will be repaired, does not assume the risk of injury but may recover if hurt, excepting where the risk of injury is so imminent that a prudent person would not have used them at all. And I conceive that there may be other exceptions to the rule. *Hough v. Railway Co.*, 100 U. S. 213, 225 and case cited; *Homestake Mining Co. v. Fullerton*, 16 C. C. A. 545, 549, 69 Fed. Rep. 923. See also *Southern Pacific Co. v. Yeargin*, — C. C. A. —, 109 Fed. Rep. 436, 441.

Judge Caldwell joins in the views expressed in this concurrence.

Filed March 31, 1902.

(*Judgment.*)

And on the thirty-first day of March, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

MONDAY, *March* 31, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Will Holloway have and recover against the Choctaw, Oklahoma and Gulf Railroad Company, the sum of twenty dollars for his costs herein and have execution therefor.

March 31, 1902.

(*Petition for Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY, Defendant in Error.

Petition for writ of error.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioner respectfully shows that it is a corporation organized under an act of the Congress of the United States, entitled, "An act to authorize the purchasers of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that company," which was approved August 24th, 1894, and the acts supplemental thereto, approved on April 24th, 1896, entitled, "An act to amend an act approved August 24th, 1894, entitled, 'An act to authorize the purchasers,'" etc., and the act approved March 28th, 1900, entitled, "An act enlarging the powers of the Choctaw, Oklahoma and Gulf Railroad Company;" that by the judgment heretofore rendered by the said United States circuit court of appeals for the eighth circuit, in the above-entitled cause, manifest error has happened, to the great damage of your petitioner, in this: That a great and manifest error at law occurred at the trial of the said cause against the objection of your petitioner, and to its great damage, all of which will more fully appear by the record of said court in said cause.

Your petitioner further shows that this is not a case in which the jurisdiction is dependent upon the opposite parties to the suit or controversy being aliens *or* citizens of the United States, or citizens of different States, nor a case arising under the patent laws, or under the revenue laws, or under the criminal laws, nor an admiralty case; and that the matter in controversy exceeds one thousand dollars besides costs.

Wherefore, your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States to be directed to the said United States circuit court of appeals for the 8th circuit, whereby, under the seal of said United States circuit court of appeals for the 8th circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with the writ of error, and that the record and proceedings aforesaid being inspected, the Supreme Court of the United States will cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1625. The Choctaw, Oklahoma & Gulf Rail road Company, plaintiff in error, *vs.* Will Holloway. Petition for writ of error. Filed May 26, 1902, John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the twenty-sixth day of May, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY, Defendant in Error.

Assignment of errors.

Now comes the above-named plaintiff in error, The Choctaw, Oklahoma and Gulf Railroad Company, by J. W. McLoud, C. B. Stuart and E. B. Peirce, its attorneys, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the eighth circuit, there is manifest error in this, to wit:

First. That by the record aforesaid, it appears that the judgment aforesaid given, was given for the said Will Holloway against the said Choctaw, Oklahoma and Gulf Railroad Company, whereas, by the law of the land, the said judgment ought to have been given for the said Choctaw, Oklahoma and Gulf Railroad Company.

Second. The plaintiff in error assigns separately as errors the several errors set out in the assignment of error forming part of the record in the above-entitled action before the said circuit court of appeals, and alleges that the said circuit court of appeals erred in not holding that the said circuit court of the United States for the western division of the eastern district of Arkansas erred in each of said assignments of error, to wit:—

First. The verdict of the jury is contrary to the evidence.

Second. The verdict of the jury is contrary to the instructions of the court.

Third. The verdict of the jury is contrary to the evidence and the instructions of the court.

Fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman, *i. e.*, whether he could easily see them by just keeping his eyes open."

Fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, the court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad, or whether it is a saw-mill man, or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employé has the right to rely upon that fact, without any examination made by himself, that the company did furnish him with reasonably safe machinery, and that it had been examined by inspectors and the proper officers of the company, before it was turned over to them, except where it is defective, and his attention has been called to the defect, and for that reason, he was told that they want it taken to the shops, or 'you must be careful with it, because there are certain defects in this machinery.' If these are pointed out to him, then he assumes the risk, if he goes on it."

Sixth. The court erred in giving that part of its charge to the jury in words as follows:

"Without hunting for it."

Seventh. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, you gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks and looking out to see whether you could find out and ascertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to Brinkley, and if by simply discharging his duty as a fireman, he was bound to have noticed it, then the law supposes that he had notice of it."

Eighth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion."

Ninth. The court erred in refusing to give instruction No. 1, asked by the defendant, in words and figures as follows:

"The court instructs the jury, that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant."

Tenth. The court erred in refusing to give instruction No. 2 asked by defendant, in words and figures as follows:

"The court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge."

Eleventh. The court erred in refusing to give instruction No. 4 asked by defendant, in words and figures as follows:

"If the jury believe from the evidence, that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant."

Twelfth. The court erred in refusing to give instruction No. 5 asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cow-catcher, was a dangerous method of riding, so far as obstructions on the track or road-bed were concerned, and the plaintiff knew, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence, and cannot recover; and that too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine."

Thirteenth. The court erred in refusing to give instruction No. 6 asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover."

Fourteenth. The court erred in refusing to give instruction No. 7, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to travel upon an engine backwards, as the proof shows his engine was running, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot recover; and that too, regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride."

Fifteenth. The court erred in refusing to give instruction No. 8, asked by the defendant, in words and figures as follows:

"The court instructs the jury that an employé is required to observe patent defects in the machinery about which he is employed, and is bound to assume the risk incident thereto to the same extent as if their existence had been within his actual knowledge."

Sixteenth. The court erred in refusing to give instruction No. 9, asked by defendant, in words and figures as follows:

"The court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him."

Seventeenth. The court erred in refusing to give instruction No. 10, asked by defendant, in words and figures as follows:

"You are instructed that if, before leaving Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have in-

formed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then his failure to take such precautions was negligence on his part, and will bar his recovery in this case; and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair and was to go to the workshop to be overhauled, and all other facts and circumstances surrounding the case."

Eighteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The railroad company is not an insurer of its employees; all that is required of it by the laws of the country is to furnish its employees working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employés, it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employé with tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries."

Nineteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Negligence in cases of this kind consists of the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employé knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely."

Twentieth. The court erred in giving that part of the charge to the jury in words and figures as follows:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you are to consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time of the alleged injuries sustained by him, was not supplied with proper brakes and brake-shoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years' experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backwards, without headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made a trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence

as a reasonably prudent person, under all the circumstances, should have known that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant."

Twenty-first. The court erred in giving that part of its charge to the jury in words and figures as follows:

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of 58 to 60 miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more."

Twenty-second. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years had been a locomotive fireman."

Twenty-third. The court erred in giving that part of its charge to the jury in words and figures as follows:

"On this issue the evidence is conflicting."

Twenty-fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff."

Twenty-fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The measure of damages, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident."

Twenty-sixth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Next, the loss of wages during the time he has, by reason of these injuries, been incapacitated from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured and what they think he will earn in his present condition, making such allowance for such time hereafter, as in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident."

Twenty-seventh. The court erred in not directing the jury to bring in a verdict for the defendant, because the record shows that the whole evidence was insufficient, under the law, to support the allegations of the complaint.

Third. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the western division of the eastern district of Arkansas to said circuit court of appeals, erred in making its order affirming the judgment of said circuit court of the United States, and directing a mandate to issue to the circuit court of the United States for the western division of the eastern district of Arkansas, directing the said circuit court of the United States to proceed in accordance with the decision and order of said circuit court of appeals.

Fourth. That the said circuit court of appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said circuit court of the United States and in not directing a new trial of the issues raised by the pleadings in said action; and the said Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court of appeals and in the circuit court of the United States for the western division of the eastern district of Arkansas, and the order entered herein as aforesaid by the circuit court of appeals, and the judgment of affirmance to be entered in the said circuit court of the United States for the western division of the eastern district of Arkansas upon said order of affirmance, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, be reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by occasion of said judgment and order.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Assignment of errors. Filed May 26, 1902. John D. Jordan, clerk.

(*Supersedeas Bond on Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a supersedas bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY, Defendant in Error.

Know all men by these presents:—that we, Choctaw, Oklahoma and Gulf Railroad Company, as principal, and Allen N. Johnson and Chas. F. Penzel, as sureties, are held and firmly bound unto the defendant in error, Will Holloway, in the full and just sum of three thousand ($3000.00) dollars, to be paid to the said defendant in error, Will Holloway, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the — day of May, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of appeals of the United States for the eighth circuit, in a suit depending in said court, between Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, and Will Holloway, defendant in error, a judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company, and the said Choctaw, Oklahoma and Gulf Railroad Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Will Holloway, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof,

Now, the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY,
By J. W. McLOUD, *General Solicitor.* [SEAL.]
ALLEN N. JOHNSON. [SEAL.]
CHAS. F. PENZEL. [SEAL.]

Sealed and delivered in presence of—
E. B. PEIRCE.

Approved by:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.
May 23rd, 1902.

This bond is good and acceptable to defendant in error.

J. W. HOUSE,
Att'ys for Def't in Error.

(Endorsed:) No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Bond. Filed May 26, 1902, John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, and Will Holloway, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Writ of error. Filed May 26 1902 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } *ss.*:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this thirty-first day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(*Citation.*)

And on the twenty-eighth day of May, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which with the acceptance of service endorsed thereon is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss.*:

To Will Holloway, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23rd day of May, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I hereby accept service of the within citation this the 27th day of May, 1902.

J. W. HOUSE,
Counsel for Defendant in Error.

[Endorsed:] No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Citation. Filed May 28 1902 John D. Jordan, clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred forty-one pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Will Holloway was defendant in error, No. 1625, December term, 1901, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service thereon and the original writ of error with my return thereto are hereto attached and herewith returned.

I do further certify that a copy of the writ of error is lodged in my office for the use of the defendant in error.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this thirty-first day of May, A. D. 1902.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18580. U. S. C. C. of appeals, 8th circuit. Term No. 352. The Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Filed June 10, 1902.